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Overview: Education and the Law

Schools, Values, and the Courts

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The Supreme Court has repeatedly emphasized the role of the nation's schools in inculcating basic values. It has described the schools as places where the "fundamental values necessary to the maintenance of a democratic political system"[1] and the "shared values of a civilized social order"[2] are conveyed. Moreover, the significance of this values inculcating function has increased in recent years: "In an age when the home and church play a diminishing role

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1. Ambach v. Norwick, 441 U.S. 68, 77 (1979).

2. Bethel School Dist. v. Fraser, 478 U.S. 675, 683 (1986). *See also* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) ("there is a legitimate and substantial community interest in promoting respect for authority and traditional values, be they social, moral or political"); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (public schools are "a most vital civic institution for the preservation of a democratic system of government"); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("the pivotal role of education in sustaining our political and cultural heritage"); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values"); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (schools are "the most powerful agency for promoting cohesion among a heterogeneous, democratic people").

in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools.[3]

There is widespread concern, however, that the schools have not adequately fulfilled this enhanced responsibility. "Many U.S. citizens today appear to believe that the public schools neither reflect nor support the values held by their clients. Nor do they see public schools exerting a sufficiently positive moral influence on young people."[4]

The schools' apparent failure to carry out fully this values mission may reflect a fundamentally insoluble values crisis at the core of contemporary society. The loss of traditional institutional anchors may have cast society irremediably adrift.[5] We should not accept such an ultimately pessimistic assessment, however, unless it is clear that the schools and other contemporary institutions have pursued all feasible means to convey substantive values that are responsive to contemporary needs.[6] In order to do so in a dynamic pluralistic society, we need to confront critical questions, such as "Can our

3. Goss v. Lopez, 419 U.S. 565, 593 (Powell, J., dissenting) (1975). For an overview on the decline of traditional values inculcating institutions, see R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 142-43 (1986) [hereinafter R. Bellah].

Although some look mainly to the schools to fill a values inculcating void, see C. Bowers, Elements of a Post-Liberal Theory of Education (1987), others seek to revive the role of all of traditional institutions by emphasizing the contemporary need for families, local communities, and churches to function as "mediating structures" between the increasingly alienated individual and the growing power of the centralized state. *See* P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy (1977); Democracy and Mediating Structures (M. Novak ed. 1980).

The diminished influence of traditional familial, community, and religious institutions has also increased the influence of the mass media on individual values. *See* A. Gutmann, Democratic Education 235-55 (1987); R. Merelman, Making Something of Ourselves: On Culture and Politics in the United States 70-158 (1984).

4. Burkholder, Ryan & Blanke, Values, The Key to a Community, 62 Phi Delta Kappan 483 (1981) [hereinafter Burkholder]. In a recent survey, PTA presidents and delegates in Baltimore County were asked if the local public schools' efforts to teach values was sufficient. Only 29% responded in the affirmative. Task Force On Values Education and Ethical Behavior of the Baltimore County Public Schools, 1984 and Beyond: A Reaffirmation of Values (1983) [hereinafter Baltimore Task Force Report].

5. Although the liberal ideals upon which America was founded asserted the rights of the individual against the often authoritarian demands of traditional institutions, liberalism in the 18th and 19th centuries "was predicated on an underlying moral, religious base. . . . Men could safely be trusted to pursue their own self-interest without undue harm to the community, not only because of the restrictions imposed by law, but also because they were subject to built-in restraints derived from morals, religions, customs and education." F. Hirsch, Social Limits to Growth 147 (1976).

6. Although the focus of this Article is on the values inculcating role of the schools, this is not to deny the importance of encouraging analogous attempts to revitalize the role of the family, the church, and the community.

public school system enumerate and have accepted by the community a common core of values?" and "Can values be endorsed in our community without endangering individual freedom?"[7]

To answer such questions, educators must press beyond traditional pedagogic parameters. The schools' efforts in this area must relate to the broader values environment, an environment which is influenced to a growing degree by decisions of the courts. Although the decline of the traditional authoritative institutions has placed increased responsibility on all branches of government, society tends to look more to courts for direction on values issues than to legislatures or administrative agencies.[8]

Society does so because courts operate in the sphere of "principle."[9] To the extent that citizens seek moral guidance from political institutions in modern society, the Constitution and related common law principles, as articulated by the courts, have become significant influences on basic societal values.[10] Although schools and courts each have significant influence on the values conveyed to students,[11] there has been insufficient communication between them on these issues. The courts tend to extol the values inculcating role of the schools in abstract terms, without directly considering the impact of their pronouncements on school operations.[12] School authorities, for their part, have tended to "view the law and the courts

7. National School Boards Association, Building Character in the Public Schools: Strategies for Success 13 (1987).

8. The orientation of both the legislative and the administrative branches is to compromise competing views. As Professor Paul Brest put it, "We simply do not believe that majorities and legislatures are willing or able to engage in serious, reflective moral discourse." Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1106 (1981). *See also* C. Lindblom, The Intelligence of Democracy (1965) (discussing "mutual adjustment" legislative processes).

9. *See* M. Rebell & A. Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism, at ch. 1 (1982).

10. *See* G. Clark, Judges and the Cities (1985); L. Friedman, Total Justice (1985); Rebell, Judicial Activism and the Courts' New Role, Soc. Pol'y, Spring 1982, at 26.

Although there is still substantial controversy concerning "judicial activism," the courts' involvement in institutional reform practices appears to have become an established fact, at least in the educational sector. Congress and state legislatures have contributed to that result by increasingly enacting statutes that establish judicially enforceable accountability standards or that explicitly require judicial oversight of administrative initiatives.

11. *See* J. Tussman, Government and the Mind 82 (1977) (schools and courts are institutions most directly involved in "teaching function" of modern state).

12. *See, e.g.*, Bethel School Dist. v. Fraser, 478 U.S. 675, 683 (1986) ("The inculcation of these values is truly the 'work of the schools.' ").

as failing to provide appropriate support and as frustrating the schools' educational goals."[13]

Local school communities need to begin a dialogue on values issues, and to understand the courts' role in this process. Courts also need to have a greater awareness of the impact of their rulings. This Article seeks to encourage and frame this local dialogue and to heighten judicial awareness. It examines the educational and social science literature and the values conflicts revealed by the landmark court cases that have grappled with values conflicts in the schools, and suggests an approach that integrates these perspectives with the practical problems local communities face in trying to reach consensus on how they should properly inculcate values in their students. This Article first examines the historical role of the schools in inculcating societal values and reviews contemporary pedagogic attempts to revive that tradition. Having concluded that present approaches to values education are inadequate, the discussion turns to a proposal for a new values dialogue methodology for a pluralistic society. The suggested methodology is then applied to two values areas, "political values" and "discipline values."

I. The Values Inculcating Role of the Schools

A. A Historical Overview

Since the early Colonial period, schools have had a more significant role in American society than in any of the Old World cultures from which most of our ancestors emigrated.[14] The move to the New World dislodged traditional cultural moorings, and education became less of a private family responsibility and more of a broad communal function.[15] The "clean slate" of the New World environment raised the questions of which aspects of traditional culture should be, and could be, successfully conveyed to the young, and

13. J. Henning, C. White, M. Sorgen & L. Steizer, Mandate for Change: The Impact of Law on Educational Innovation 231 (1979) [hereinafter J. Henning].

14. In traditional European society, grammar school level education was primarily the responsibility of the patriarchal family, and home education was the assumed, natural educational mode. *See* Musgrove, The Decline of the Educative Family, Universitas Q. 377, 391-92 (1969). This central family role was complemented by the local community and the church, which reinforced the established values transmitted primarily through the family, thus creating "an integrated, unified culture" based on continuing traditions. *See* B. Bailyn, Education in the Forming of American Society 21 (1961).

15. L. Cremin, American Education: The Colonial Experience, 1607-1783, at 193 (1970).

which new values should be fostered. The range of views and lifestyles which the diverse individuals who settled new towns and communities brought with them made it imperative that the settlers face the process of transmitting values in a way that it never had been in the European context. Schools began for the first time to take on a deliberate socialization function.[16]

Given the religious motivation that brought many of the colonists to the New World and the reality that many of the colonies were religiously diverse, the core parental concern was to assure that their offspring adhered to the familial faith. The transmission of sectarian religion therefore became one of the prime functions of the schools.[17]

With the advent of the American Revolution, many of the leaders of the new republic saw a broader, national purpose for the schools. Schools could assist in building the new nation by "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture."[18] The ideals of "republican schooling," though forcefully pressed by advocates such as Thomas Jefferson and Benjamin Rush, were not widely adopted at the end of the 18th century, largely, it seems, because of the state legislatures' unwillingness to vote the taxes necessary to fund such systemic schooling.[19]

By the 1830s, however, accumulated economic and political developments required a new approach to schooling, and the seeds of the concept of republican schooling planted half a century earlier began to take root. Rapid industrialization and geographic expansion gave immediacy to the notion of forging a common citizenry with inspirational "Republican" values. The growing numbers of new immigrants from diverse backgrounds gave further impetus to the effort to inculcate common American values. The resurgent fervor for a nationalistic republicanism was accompanied by an evangelical revival which "assumed an inextricable link between Protestantism and patriotism . . . it saw the new nation incarnating

16. B. Bailyn, *supra* note 14, at 21.

17. *Id.*

18. L. Cremin, American Education: The National Experience, 1783-1876, at 3 (1980). Benjamin Rush, for example, spoke of converting youth into "Republican machines." B. Rush, A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania, in Essays on Education in the Early Republic 17 (F. Rudolph ed. 1985).

19. C. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860, at 9 (1983). *See also* E. Cubberley, Public Education in the United States 129-39 (1919) (discussion of movements for tax reform in early common school period).

the aspirations of God and the hopes of mankind for a purified society that would live according to the dictates of Scripture.[20]

This intermixture of patriotic/religious ideals and economic expansion came together to forge the common school movement. As its name implies, the common school movement was an attempt to bring together all children living in a particular geographic area, whatever their class or ethnic background. Democratic values would be enhanced by integrating under one roof, and inculcating with one common patriotic creed, the rich and the poor, the long-settled and the immigrant, the religious and the irreligious.

Centralized administration under the auspices of a single education department in each state, improved instruction, and the spread of literacy were important aims of the common school movement, but there can be little doubt that "morality was the most important goal of common education."[21] The moral values that the common schools sought to inculcate consisted in the first instance of traditional virtues like honesty, generosity and charity. To these classic character traits were added attributes suited to distinctive American needs, like individualism and self-reliance. One of the common school movement's chief proponents, Horace Mann, the Massachusetts legislator and school secretary, expressed its character-building ideals in the following millennial terms:

> Let the common school be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine-tenths of the crimes in the penal code would become obsolete; the long catalogue of human ills would be abridged; men would walk more safely by day; every pillow would be more inviolable by night; property, life and character held by strong tenure; all rational hopes respecting the future brightened.[22]

A second set of values were the attributes of discipline, self-control, industriousness, and obedience, which were considered necessary qualities for success both in school and in the work world of a rapidly industrializing society.[23] The third set of values the common schools sought to convey were the political values of patriotism, democracy, and civic responsibility. A universal, state-

20. L. Cremin, *supra* note 18, at 57.

21. C. Kaestle, *supra* note 19, at 96.

22. H. Mann, Common School Journal III, at 15 (1841), *quoted in* L. Cremin, *supra* note 18, at 137. *See also* H. Mann, Annual Reports on Education 577 (1868) (with proper education 95% of all children would be "supporters of the moral welfare of the community").

23. S. Bowles & H. Gintis, Schooling in Capitalist America (1976), argue that the common school movement primarily served the interests of an exploitative, capitalist

supported public school system would realize and expand upon Jefferson's vision of educating the citizenry to be "the ultimate guardians of their own liberty."[24] Finally, the common schools were also expected to convey fundamental spiritual values of love of God, piety, and respect for religious institutions. Common school advocates expected there to be "daily reading of the Bible, devotional exercises, and the constant inculcation of the precepts of Christian morality in all the public schools."[25]

The kinds of values conveyed by the nineteenth century common schools were reflected in the McGuffey readers, the widely-used elementary school primer which sold more than 122 million copies between 1836 and 1920, and which, by one estimate, guided the minds of four-fifths of the school children of the nation in that era.[26] McGuffey's primary aim was to teach children moral virtues, and, as one commentator notes, "children learned moral virtues best . . . through real-life human interest stories that were read aloud and memorized."[27] Through reading passages with titles such as "The Greedy Girl," "Advantages of Industry," "George and the Hatchet," and "Religion, the Only Basis of Society," the McGuffey

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class. Even if one equates the inculcation of discipline and industriousness with preparation for the factory assembly line, this position improperly subordinates the other goals of the common school movement, discussed in the text. Nevertheless, it is clear that the common schools and later, related developments such as the widespread adoption of the "Lancaster model" (by which a single master working with student apprentices could operate a school for 500 children) were significant factors in the preparation of workers for the industrial economy. *See also* T. Peterson, The Politics of School Reform, 1870-1940 (1985); D. Tyack, The One Best System (1974).

24. Jefferson, Notes on Virginia, in Four Works of Thomas Jefferson 60-65 (1904).

25. H. Mann, Eleventh Annual Report of the Secretary of the Board 90-91 (1848), *quoted in* C. Glenn, The Myth of the Common School 166 (1988). The movement's leaders did not, however, want the common schools to engage in the type of sectarian, religious indoctrination that had prevailed in the local community/church schools they sought to replace. On the contrary, they saw as one of their major reforms the common schools' non-denominational orientation, emphasizing "natural theology" and an explicit rejection of liturgical practices and sectarian doctrines. The non-denominational goal, as stated by Unitarian minister Charles Brooks in 1837, was that "[t]he primary schools should be Christian, but neither Protestant nor Catholic. They should not lean to any particular form of worship nor teach any positive dogmas; but should be of that kind that Jews might attend them without inconvenience to their faith." C. Glenn, *supra*, at 38.

26. *See* R. Mosier, Making the American Mind: Social and Moral Ideas in the McGuffey Readers 168-69 (1947). *See also* H. Minnich & W. Holmes, McGuffey and His Readers 19-40 (1936).

27. J. Westerhoff, McGuffey and His Readers 45 (1978).

readers well conveyed the basic set of character, discipline, democratic, and religious values of "middle class, conventional" nineteenth century America.[28]

Little objection was raised to the character, discipline, and political values conveyed by the nineteenth century common schools. The transmission of religious values, however, brought immediate objection from many Orthodox Protestants, who decried the emphasis on non-denominational natural theology, divorced from ritual and the teachings of revelation. Even more substantial opposition came from Catholic leaders, who saw the common school curriculum, and especially the "non-denominational" readings from the King James Version of the Bible, as serious threats to the integrity of their faith. A number of attempts were made to negotiate methods that might allow public schools with Catholic majorities to use different Bibles or to otherwise assert their own religious perspectives, but these proved abortive. Consequently, Catholic leaders decided to establish a separate parochial school system.[29]

The result of the Catholic/Protestant schooling split of the mid-nineteenth century was to postpone for future resolution the fundamental values clash at the root of the confrontation. Purged of their largest and most vociferous minority faction, the public schools continued to implement and develop a majoritarian common school credo, while Catholics and other values dissenters withdrew and pursued their own separate values agendas.[30]

B. Contemporary Values Education

Over the course of the past century, the broad values consensus reflected in the McGuffey readers has disintegrated. Contemporary

28. Commager, Foreword, to McGuffey's Fifth Eclectic Reader, at x (6th ed. 1962). *See also* R. Mosier, *supra* note 26, at 114-23, 132-53; H. Minnich & W. Holmes, *supra* note 26, at 89-112; J. Westerhoff, *supra* note 27, at 94.

29. Some state legislatures originally had authorized public funding for separate Catholic schools, but these experiments were soon abandoned. For discussions of the origins of the separate Catholic school system in New York City and California, see D. Ravitch, The Great School Wars (1974); D. Tyack, Turning Points in American History 90-91 (1967).

30. This split schooling compromise was later given constitutional imprimatur by the United States Supreme Court in Pierce v. Society of Sisters, 268 U.S. 510 (1925). *Pierce* upheld the right of parents to send their children to private schools, at their own expense.

textbooks do not seek to instill didactic moral lessons; on the contrary, they tend to avoid serious consideration of values issues.[31] The elimination of religious teaching and observance in many schools has been accompanied by the removal of an entire range of "beliefs, commitments and passionately held values" underlying "the most enduring questions of civilization and human nature."[32] A perceived lack of inculcation of "high moral standards" has been one of the major public criticisms of the schools in recent years.[33]

Despite the successful establishment of a common school system, the inculcation of common values is probably further from realization than it was a century ago. The reasons for this phenomenon are not difficult to fathom. Values consensus is difficult to achieve in modern America because there is today a much greater degree of conflict on basic values than in decades past. Although the proportion of recent immigrants to total population may be lower than in the nineteenth century, ethnic and cultural self-assertion and a dynamic ethic of aggressive individualism result in pervasive values clashes. In the educational context, large urban school districts, as well as centralized suburban and rural districts, bring together under one broad umbrella an unprecedented range of diversity in their student populations.

Certain legal developments of the last century have fueled the inherent potential for values conflict in contemporary school settings. The spread of compulsory education statutes in the late nineteenth century[34] compelled the attendance of large numbers of students, at increasingly older ages, who were not inclined to accept easily the conventional middle class values that had constituted the common school consensus.[35] More recently, implementation of school desegregation decrees has brought together students of differing racial and ethnic backgrounds, sometimes in situations that have

31. *See, e.g.*, F. FitzGerald, America Revised: History Schoolbooks in the Twentieth Century (1979); Patrick, Political Socialization and Political Education in Schools, in Handbook of Political Socialization 203 (S. Renshon ed. 1977) ("conflicts about values . . . have been omitted or treated superficially").

32. Arons, Commentary, Education Week, Nov. 7, 1984, at 24.

33. Gallup, Eighth Annual Gallup Poll of Public's Attitudes Toward the Public Schools, 58 Phi Delta Kappan 187 (1976). In another recent Gallup Poll, 76% of the public favored moral instruction in the schools, while only 4% were opposed. Burkholder, *supra* note 4, at 483.

34. *See* Tyack, Ways of Seeing: An Essay on the History of Compulsory Schooling, 46 Harv. Educ. Rev. 355 (1976).

35. Compulsory education also changed the nature of schooling by enhancing the authority of school officials at the expense of the family. *See* Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?, 50 S. Cal. L. Rev. 871, 886 (1977) (discussing common law right

exacerbated cultural conflicts. Finally, the emergence of a legal climate of rights entitlement in recent decades has motivated many students and their parents to assert vigorously their personal values and to resist attempts by school administrators and teachers to inculcate traditional or "mainstream" values.

In sum, modern trends of urbanization, centralization, and individual rights assertion have revived and amplified the underlying unresolved values conflicts in the American educational system. The perplexing dilemma of how common values can be conveyed in a pluralistic society, the issue which had been deferred by the Protestant/Catholic split of the nineteenth century, has now returned to the top of the public school agenda. Moreover, added to the historical confrontation on religious values are modern differences on character, discipline, and political values which had, generally speaking, been assumed to constitute consensus values during the nineteenth century.

Despite the difficulty of formulating and transmitting common values under these circumstances, the importance of the task has led educators to develop new approaches for conveying values through the schools, some of which have stirred significant controversy. The three main approaches have been "Values Clarification," "Cognitive Moral Development" and "Character Education."

1. Values clarification. In the early part of the twentieth century, many states enacted statutes that required schools to teach specified moral values. For example, California mandated:

> Each instructor shall endeavor to impress upon the minds of the students the principles of morality, truth, justice, patriotism and a true comprehension of the rights, duties and dignity of American citizenship, including kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and principles of free government.[36]

Statutory language of this sort harks back to the pedagogic approach of the McGuffey readers. Many contemporary educators,

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of parents, prior to adoption of compulsory education laws, to have their children excused from any form of instruction to which they objected). *See generally* L. Kotin & W. Aikman, Legal Foundations of Compulsory Attendance (1980).

36. Cal. Educ. Code § 87705 (West 1978), *repealed by* 1981 Cal. Stat. 470. Eight states enacted statutes requiring the study of the dangers of communism, and 16 states required the teaching of certain moral values. Edelman, Basic American 6 N.O.L.P.E. Sch. L.J. 83, 88, 90 (1976). *See also* D. Tyack, Toward a Social History of Law and Public Education, in School Days, Rule Days 212-14 (D. Kirp & D. Jensen eds. 1986) (legislation on patriotism and temperance reflected "fear of pluralism").

while perhaps supporting the ideals of such statutes, have concluded that abstract principles such as "morality, truth, justice and patriotism" cannot be taught through authoritative lectures or didactic reading materials.[37]

The Values Clarification movement explicitly rejects such attempts to instill any particular set of values or beliefs. It considers such "indoctrination" pointless, given the diversity of political, religious, and moral beliefs among contemporary students.[38] Instead, its adherents seek to counter tendencies toward indecision or impetuousness many students exhibit when faced with a bewildering array of conflicting values choices. They seek to help students analyze, understand, and choose those values that are most appropriate for their own lives and environments.

Teachers may promote these goals by leading students through a series of writing and discussion exercises which involve choosing specific beliefs and behaviors from a series of alternatives after thoughtful consideration of the consequences of each alternative; affirming the choice in the presence of others; and then acting consistently on the choice in some real life situation. The premise of the Values Clarification approach is that in making their own choices, acting upon them, and evaluating the actual consequences, students will learn to develop substantive values which will serve important personal needs.

Critics of Values Clarification claim that its adherents offer not education and substantive values, but merely manipulation of "desires and self-gratification" and "an endless succession of conflicts and dilemmas."[39] Religious groups have also claimed that by

37. Some educators were influenced by a highly influential study which found few, if any, correlations between knowledge of moral codes and demonstrable moral behavior. H. Hartshorne & M. May, Studies in the Nature of Character (1928-30).

38. *See* S. Simon, L. Howe & H. Kirschenbaum, Values Clarification: A Handbook of Practical Strategies 20 (1972); L. Raths,.M. Harmin & S. Simon, Values and Teaching: Working with Values in the Classroom (1966). For an overview of the values clarification perspectives, see also B. Chazan, Contemporary Approaches to Moral Education (1985).

39. Bennett & DeLattre, Moral Education in the Schools, 50 Pub. Interest 81, 86, 98 (1978). *See also* Bennett, What Value is Values Education?, Am. Educ., Fall 1980, at 32 (arguing that values education exercises offer students an impoverished range of options); W. Damon, The Moral Child 136 (1988) (claiming that teachers' unwillingness to take a stand on ethical issues is unacceptable for a role model). A detailed analysis of 13 empirical studies of the impact of values clarification concluded that "there is no evidence that values clarification has a systematic, demonstrated impact on student's values." Lockwood, Effects of Values Clarification and Moral Development Curricula on School-Age Subjects: A Critical Review of Recent Research, 48 Rev. Educ. Res. 325, 344 (1978).

emphasizing subjective choice in the valuing process, Values Clarification promotes a form of moral relativism which is inconsistent with traditional moral understanding and particular religious doctrines.[40]

2. *Cognitive moral development.* The second major contemporary approach to values education is that of Cognitive Moral Development, a perspective based on the theories of the late Harvard psychologist Lawrence Kohlberg. Kohlberg, like the Values Clarification advocates, rejected traditional moral indoctrination approaches as being a useless "bag of virtues."[41] Unlike Values Clarification advocates, he argued that children should be encouraged to progress through defined stages of moral development to achieve values understandings that are objectively superior.

Based on his own studies of moral development in adolescents, as well as other anthropological and cross-cultural investigations, Kohlberg formulated a model of six specific stages of cognitive moral development, progressing from punishment and obedience to universal ethical principles.[42] Kohlberg believed that these stages represent universal developmental sequences; cultural factors in any particular setting may speed up or slow down these developments, but they will not change the sequence. He also claimed that the stages constitute a morally progressive order with each level being superior to that preceding it.

In later years, he developed specific pedagogic methodologies. His technique is based upon a systematic presentation of hypothetical moral dilemmas. Students are asked to reflect on alternative ways of reasoning about these moral conflicts. They are encouraged to consider the adequacies and inadequacies of the thinking process

40. Phyllis Schlafly, for example, criticizes Sidney Simon's lifeboat exercise for this reason. In this exercise, a student is asked to decide which five of the ten passengers in a sinking lifeboat must be thrown overboard if the rest are to survive. According to Schlafly, a creative religious child might well respond by saying, "Jesus brought another boat, and nobody had to drown," but such a child would receive an "F" from a Values Clarification teacher. Office of Legal Services of the New York City Board of Education, 1987 Conf. Proc. on The First Amendment, Secular Humanism and the Teaching of Values in Public Schools 65.

41. L. Kohlberg, The Philosophy of Moral Development 28 (1981). For a modification of Kohlberg's approach that views indoctrination of "a bag of virtues" at an early stage as a useful "provisional morality" out of which later moral autonomy can be developed, see R. Peters, Authority, Responsibility and Education, at ch. 12 (3d ed. 1973).

42. L. Kohlberg, *supra* note 41, at app. The intermediate stages, from the lowest stage of development, are: individual instrumental purpose and exchange; mutual interpersonal expectations, relationships, and conformity; social system and conscience maintenance; and prior rights and social contract utility. At one point Kohlberg estimated that only 5% of the American population will reach the highest moral stage. *Id.* at 88.

that they have employed. Finally the teacher suggests other approaches in order to "bump" students into a higher level of moral development.[43] Kohlberg also elaborated a concept of a "just community school," under which an entire school environment would be organized to promote consistently his theories.[44]

Kohlberg's approach has been criticized for the alleged incompleteness of its empirical data base[45] and for its failure to reflect a full range of cognitive approaches to moral understanding, specifically, its inadequate recognition of certain distinctively feminine values.[46]

Pedagogically, Kohlberg's approach has been found to be empirically effective in stimulating children's moral judgment,[47] but it is unclear whether "this progress carries over to the level of the subjects' behavior and leads them to act in ways morally better according to the standards of the stage theory of moral development."[48]

3. Character education. Whatever the validity of the specific criticisms that have been lodged against Values Clarification and Cognitive Moral Development, it is significant that contemporary American schools are not widely implementing either approach. A plausible explanation for this limited acceptance is that neither Values Clarification nor Cognitive Moral Development directly confronts the fundamental contemporary values challenge. Both focus

43. B. Chazan, *supra* note 38, at 86.

44. In fact, he helped organize such schools in two suburban communities. F. Power, A. Higgins & L. Kohlberg, Lawrence Kohlberg's Approach to Moral Education (1989).

45. R. Hall & J. Davis, Moral Education in Theory and Practice 99 (1975); R. Hersh, D. Paolitto, J. Reimer, Promoting Moral Growth: From Piaget to Kohlberg 100-01 (1979).

46. *See* C. Gilligan, In a Different Voice 18-20 (1982). Kohlberg acknowledged in his later writings that principles of altruism, care, or responsible love had not adequately been represented in his earlier work, and he revised his description of the various stages to respond to these issues. *See* L. Kohlberg, The Psychology of Moral Development, at ch. 3 (1984).

Kohlberg has also been attacked for his "Platonic" attempt to impose "a general will," consisting of his own notion of "justice," as a universal moral standard. *See* Bennett & DeLattre, *supra* note 39, at 86. Kohlberg sought to counter such criticism by noting that his concept of justice as equality is consistent with Rawls's Theory of Justice. L. Kohlberg, *supra* note 41, at ch. 5. *See* J. Rawls, A Theory of Justice (1971). This perspective is widely accepted as being at the core of fourteenth amendment egalitarian principles. *See, e.g.*, R. Dworkin, Taking Rights Seriously, at ch. 6 (1977); Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 6 (1977).

47. W. Damon, *supra* note 39, at 140. *See also* Lockwood, *supra* note 39, at 358 (Kohlberg's direct discussion approach produces "significant development in moral reasoning . . . [especially] among subjects who reason at lower levels").

48. Pritchard, Moral Education and Character 13 (U.S. Dept. of Educ. Monograph 1988).

on the individual developmental process and the formulation of a personal moral code; neither claims to deal with the inculcation of broad-based societal values, or with the reconciliation of competing values in a pluralistic setting.

"Character Education," the third contemporary approach to moral education in American public schools, does attempt to inculcate substantive societal values. Calling explicitly for a return to the "great tradition" of the deliberate transmission of moral values to students,[49] "character education typically endorses a specific content to be learned, a set of qualities and moral virtues . . . [and] concentrates directly on behavior that reflects the acceptance of the relevant values . . . ."[50] Character educators argue that all Americans can agree on the desirability of inculcating such virtues as thoughtfulness, diligence and honesty,[51] or due process, equality of opportunity, tolerance and patriotism.[52]

Although many of the values advanced by character educators seem unexceptional, once one goes beyond the surface to decipher what "honesty" or "tolerance" might actually mean in particular contexts, the apparent universal acceptability is placed in doubt. Value terms have significantly different meanings to different people and in differing contexts. For example, as Ivor Pritchard asks, does "honesty" involve "no lying or cheating, or does it also require volunteering the truth when the situation calls for it? And should people be honest no matter what the consequences?"[53] Moreover, character educators do not confront the core issue of which value should prevail in situations of value conflict. Should justice prevail

49. Wynne, The Great Tradition in Education: Transmitting Moral Values, 43 Educ. Leadership 4 (1986). *See also* Wynne, The Declining Character of American Youth, Am. Educ., Winter 1979, at 29.

50. Pritchard, Character Education: Research Prospects and Problems, 96 Am. J. Educ. 469-70 (1988). *See also* Bennett & DeLattre, A Moral Education: Some Thoughts on How to Achieve It, Am. Educ., Winter 1979, at 9 (stories in McGuffey readers are "still worthy of close attention").

51. Bennett, A Cry for Sound Moral Education, Insight, Dec. 29, 1986, at 61. *See also* Grant, Schools That Make an Imprint: Creating a Strong Positive Ethos, in Challenge to American Schools: The Case for Standards and Values 127, 143 (J. Bunzel ed. 1985).

52. These are some of the items on the list of "A Common Core of Values" for a pluralistic society set forth in the Baltimore Task Force Report, *supra* note 4, at 5. Detailed curricula emphasizing substantive character education values have been developed and broadly disseminated by the American Institute for Character Education in San Antonio, Tex. and by the Thomas Jefferson Research Center, Pasadena, Cal.

53. Pritchard, *supra* note 50, at 473. *See also* M. Rokeach, The Nature of Human Values 7 (1973) (distinguishing between "instrumental values," referring to modes of conduct, and "terminal values," relating to end states of existence). Character education has also been criticized for advocating indoctrination without fostering a capacity to make autonomous moral choices. W. Damon, *supra* note 39, at 145.

over tolerance? Discipline over free speech? Once these hard questions are asked, the asserted consensus on basic values tends to disintegrate.

In sum, then, the character education movement's attempt to promote substantive values ultimately founders on its failure to deal seriously with the problems posed by pluralism.[54] Given the heterogeneous population of twentieth century schools, nineteenth century notions of consensus, no matter how delicately restated in a twentieth century vocabulary, simply cannot hold.

In order to establish a viable set of substantive values in contemporary schools, we must directly confront issues of value conflict and values priority. To do this, more than the subjective pronouncements of a single writer must be considered. The problem of values transmission in a pluralistic society can only be met effectively by a values approach that involves the intensive engagement of diverse individuals and groups. The next section proposes such an approach.

I. A Values Dialogue Methodology for a Pluralistic Society

A viable approach to contemporary values inculcation should be based on a broad participatory process that fairly includes minority and dissenting interests and that presses all concerned to confront and resolve their value differences. Involvement in such an intense civic enterprise may induce the participants to think about their values standards, to consider the validity of their opponents' views, and to move closer to mutual understandings. Community discussions may thereby reveal greater common ground and a higher degree of concurrence than the participants had originally assumed. Even in the best of circumstances, however, we must assume that we can not achieve full resolution of all major values conflicts. Where value resolution proves impossible, a successful dialogue process may nevertheless produce qualifications, compromises, or degrees of acceptance sufficient to allow schools to transmit majoritarian values in a manner that minorities find acceptable.

54. There are other thinkers who offer helpful insights on contemporary values issues, but they also do not purport to offer a systematic method for dealing with the education system's values inculcating responsibilities. *See* R. Coles, The Moral Life of Children (1986) (accounts of moral integrity of certain children growing up in disadvantaged conditions); W. Damon, *supra* note 39, at 145 (suggestions for "respectful engagement" with students' moral reasoning and use of "moral mentors" as role models).

Contemporary resolutions or compromises on values issues will not likely replicate the cohesive values formulations of some homogeneous, traditional communities. Focused dialogues on these issues can, however, lead to agreements on the desirability of transmitting certain substantive values in meaningful ways in the schools, and the process itself may create a climate of engagement that would be a significant improvement over the adversarial values confrontations or avoidance of values issues which predominate in local school communities today.

Precisely how can such a task be undertaken? The first step is to define the term "values" and to determine which specific issues should be the subjects for a values dialogue.

A. Defining the Appropriate Values

A "value" is sometimes seen as a mere subjective preference of an individual which has no necessary social or moral dimension.[55] In a public policy or educational context, however, values must be assumed to have a moral dimension which is related to significant societal purposes. Accordingly, "values" in this context must mean principles or standards reflecting the morality and the aspirations of the society and which are broadly considered necessary or desirable for the society's functioning and perpetuation.[56]

Many values, ranging from altruism to zealous advocacy, might meet this definition. In order to analyze the central societal values that contemporary schools should transmit, a logical point of departure would be the values categories with which schools historically have been concerned. As discussed in the preceding section, the values that schools sought to convey in the nineteenth century fell under four broad categories: character values, discipline values, political values, and religious values. These traditional categories have obvious continuing relevance, although particular emphases and issues within each broad category may need modification to reflect modern needs. Contemporary realities also require the addition of two new values categories. First, the impact of the civil rights movement on the legal and political system requires inclusion of a

55. *See* R. Bellah, *supra* note 3, at 79-80.

56. "Values" in this sense constitute "reasons for action" and are to be distinguished from "aesthetic values," which may reflect a society's morality and aspirations, but provide no reasons for action. *See* J. Raz, The Morality of Freedom 396 (1988). *See also* M. Rokeach, *supra* note 53, at 5 (value defined as "an enduring belief that a specific mode of conduct or end state of existence is personally or socially preferable to an opposite or converse mode of conduct or end state of existence").

category of "equity values" as part of the working framework. Second, because of significant changes in sexual mores and in legal attitudes toward contraception and abortion, "sexual values" have become an issue of major import for contemporary schools.

Accordingly, the six basic categories of contemporary school-related values might be expressed as follows:

(1) *Character values* encompassing such traits as honesty, altruism, and self-reliance, as well as temperance and avoidance of drug use.

(2) *Discipline values* encompassing basic traits necessary for the efficient functioning of schools and workplaces, such as orderliness, industriousness, adherence to fair procedures, and respect for authority.

(3) *Political values,* such as patriotism, freedom of expression, tolerance for opposing views, civic responsibility, and respect for the rule of law.

(4) *Equity values* emphasizing non-discriminatory treatment of racial minorities, females, linguistic minorities, and the disabled.

(5) *Sexual values* involving issues of sex education and individual and societal decisions on questions such as premarital sex, contraception, abortion, and attitudes toward marriage.

(6) *Religious values* encompassing religious beliefs or equivalent perspectives on the ultimate meaning of life or ultimate bases for ethical or moral systems.

Setting out the basic values issues in categorical fashion is somewhat artificial since it ignores obvious overlaps between the areas (many "equity" values are obviously "political," many "character" values have "religious" overtones). Nevertheless, categorization permits analytic coherence and will facilitate organized discussion. For example, listing the various values in categorical fashion makes clear that certain values issues are inherently more controversial than others, and that it would be prudent to initiate a dialogue process with fewer divisive issues. Thus, acceptable values resolutions are most likely to be achieved in regard to "character values" and least likely to be achieved in regard to "sexual values" and "religious values." "Discipline values," "political values" and "equity values" form a middle range of more likely, though not easily attainable, achievement.

B. Structuring the Dialogue

The second step in constructing a pluralistic values dialogue is to determine who should participate and how the dialogue should be

structured. For a values dialogue to be effective, all elements of the school community should participate, or at least be given fair access to the values formulation process. Despite problems of low levels of parent participation and high levels of state and federal regulation, the local school community remains the prime forum for meaningful participatory democracy in contemporary America, and significant potential for substantive citizen input is there to be tapped.

In order to maximize the likelihood of success of a broad-based community dialogue and to assure potential participants that a significant enterprise, worthy of their active involvement, is at stake, committees of community representatives should not be convened until a well-conceived agenda and a tested methodology for confronting substantive values issues in a dynamic pluralistic setting is available. Such an agenda and a methodology can be constructed through an interdisciplinary approach using legal and educational sources.

The courts' extensive involvement in educational values issues began more than three decades ago with the Supreme Court's landmark school desegregation decision, *Brown v. Board of Education.*[57] Since that time, the courts' docket of schooling cases has been extended to encompass issues of gender discrimination and rights of the disabled, bilingual/bicultural programming, student expression, discipline, and the free exercise of religion in the schools.

Decrees issued in these cases strongly influence educational values, sometimes through direct mandates that fully resolve the value issues in conflict (as in *Brown*), but more often through indirect processes which influence, but do not fully resolve the value conflicts. Generally, court cases clarify the competing value considerations at stake in the particular matter before them, but stop short of resolving fundamental conflicts; the courts' prime mission, to apply relevant law to solve a dispute between immediate litigants, can be accomplished without confronting fully the underlying fundamental values issues. Even if courts fail to resolve all of the values issues presented, however, the adversary process induces the parties involved, and the judges in their summary presentations of the issues, to provide sharply focused analyses of the essential value issues at stake. In short, court decisions, both in their holdings and in their presentation of the conflicting perspectives, often offer a ready-made, well-defined agenda of relevant values issues.

57. 347 U.S. 483 (1954).

The judicial process also provides an instructive "methodology" for dealing with controversial values issues in a pluralistic society. To the extent that judicial decisions move toward resolution of fundamental value conflicts, it is usually through a "common law" approach, which allows principles to be built gradually over time from the facts and experiences reflected in a variety of concrete litigated conflicts.[58] The common law approach is relevant to pluralistic decision making on controversial issues in three specific ways. First, it emphasizes resolutions based on concrete experience and practical usages, in contrast to abstract philosophical principles. Second, it seeks to incorporate a broad array of information and experience relevant to the subject matter at hand. Third, the common law approach stresses the continuing development and modification of doctrine over time.

Although the substantive issues articulated in court cases and the common law methodology used to decide them are useful starting points for a pluralistic values dialogue, they are not sufficient. The inherent limitations of the adversary process preclude input by many groups and individuals who are affected by the broad educational issues raised in these cases. This means that relevant issues and important considerations may be overlooked because they do not happen to be raised by the parties to a lawsuit.[59] For these reasons, the values issues and methodological approaches that are revealed by court decisions need to be supplemented with broader references to the full range of values issues and perspectives relevant to the educational domain. We therefore should consider the educational, sociological, and political science literature dealing with values issues, as well as the perspectives of knowledgeable educators.

The balance of this article will attempt to construct an agenda and a methodology for a pluralistic values dialogue from all of these legal and educational sources. The next two sections will discuss in detail particular values conflict problems arising in two of the

58. G. Calabresi, Ideals, Beliefs, Attitudes and the Law 88 (1985) applies a "common law methodology" for understanding and explicating underlying value issues in the field of torts law. The essence of his approach was "to build up from cases, hypothetical and real, [rather] than by working down from great principles." *Id.* at xv. *See also* B. Ackerman, Reconstructing American Law (1984) (recommending values dialogue approach to all areas of contemporary lawmaking).

59. *Cf.* G. Calabresi, *supra* note 58, at 121.

"middle-range" values categories which appear most suitable for initiating a dialogue methodology, namely "political values" and "discipline values."[60]

III. Political Values

A. The Conceptual Framework

The process by which a society passes its culture on to the next generation in order to maintain societal cohesion and continuity has been termed "socialization."[61] Political scientists have in recent years focused specifically, within the broad field of cultural socialization, on the origins of political outlooks. This field is known as "political socialization."[62] Political socialization occurs through both direct efforts to influence political attitudes and actions and indirect processes that shape attitudes and beliefs. Those involved may be unaware of the indirect processes. Schools are a significant institutional influence in introducing the child to the political culture on both dimensions. Schools act as deliberate agents of political socialization primarily through two means: (1) classroom rituals such as flag salutes, patriotic songs and the discussion of national heroes and events; and (2) the school curriculum, which conveys

60. The dialogue methodology was tested at an intensive symposium at Yale Law School in April 1989. The participants, selected to include diverse ethnic and racial backgrounds and a range of political perspectives, were Judge George C. Pratt, United States Court of Appeals for the Second Circuit; Judge John T. Curtin, United States District Court, Western District of New York (now Senior Judge); Senior Judge Joseph P. Kinneary, United States District Court, Southern District of Ohio; Chief Judge Manuel L. Real, United States District Court, Central District of California; Scott Brohinsky, deputy commissioner, Connecticut State Department of Education; Ronald Valenti, superintendent of schools, Harrison, N.Y.; Richard Wallace, superintendent of schools, Pittsburgh, Pa.; Johnny Giles, principal, Lufkin Junior High School, Lufkin, Tex.; Angela Perez Miller, principal, Sayre Language Academy, Chicago, Ill.; Susan Rafferty, social studies teacher, Yorktown High School, Arlington, Va.; Steven Teel, social studies teacher, Berkeley High School, Berkeley, Cal.

The author and the following members of the Yale faculty also participated in the discussions: Professor John S. Simon; Professor Kate Stith; Professor Shelley Burtt. Students in the seminar on law and education at Yale Law School and articles editors of the Yale Law and Policy Review also attended the symposium as observers.

The comments of the symposium participants and consensus positions taken by the group on a number of issues influenced the author's analysis of the issues and some of his conclusions.

61. B. Sugarman, The School and Moral Development 31 (1973). For an analysis of how schools socialize children for the commitments and capacities needed for their future roles, see Parsons, The School Class as a Social System: Some of Its Functions in American Society, 29 Harv. Educ. Rev. 297 (1959).

62. *See, e.g.*, R. Dawson, K. Prewitt & K. Dawson, Political Socialization 1 (2d ed. 1977) [hereinafter R. Dawson].

formal political knowledge to the student.[63] Children are indirectly socialized through school organization, routines, pedagogical approaches, and teacher attitudes.

Political socialization researchers have conducted empirical studies to determine precisely how schools carry out the political socialization process and how effective their efforts have been. Early studies found, for example, that substantial growth in political conceptualization occurs in the elementary years,[64] although significant influences also occur during high school,[65] and that there are important differences in the political attitudes among children from differing socio-economic backgrounds.[66]

By and large, political socialization studies have been critical of the schools for teaching a "simplistic" view of the political process,[67] and for conveying no more than "lukewarm support for poorly understood democratic values."[68] Much of the problem here may lie in an unwillingness to confront controversial issues in an honest, challenging manner that will capture the imagination of students; some of it may also stem from a lack of clarity about the purposes and goals of political socialization.

Political socialization is often viewed as a conservative process which seeks to assure that young children accept and perpetuate traditional societal norms:

> Political socialization refers to the process by which people learn to adopt the norms, values, attitudes and behaviors accepted and practiced by the ongoing system. Such learning, however, involves much more than the acquisition of the appropriate knowledge of a society's

63. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L.J. 90, 102 n.51 (1975) (citing Dawson, *supra* note 62, at 147-58). *See also* G. Almond & S. Verba, The Civic Culture (1963) (comparative study of socialization factors supporting democratic institutions); R. Hess & J. Torney, The Development of Political Attitudes in Children 105-06, 108 (1967) (effects of classroom rituals).

64. R. Hess & J. Torney, *supra* note 63.

65. M. Jennings & R. Niemi, The Political Character of Adolescence (1974).

66. F. Greenstein, Children in Politics 85-107 (1969). Another study found that civics courses tend to influence black students more than they influence white students, largely because of black students' lesser prior exposure to those concepts. M. Jennings & R. Niemi, *supra* note 65, at 196.

The effects found by some of these studies were, however, weak, and the validity of the quantitative research methodology, usually based on paper and pencil questionnaires with forced choice item answers, has been questioned. *See* Connell, Why the "Political Socialization" Paradigm Failed and What Should Replace It, 8 Int'l Pol. Sci. Rev. 3:215 (1987).

67. R. Sigel & M. Hoskin, The Political Involvement of Adolescents 116 (1981); Hess, Political Socialization in the Schools, 38 Harv. Educ. Rev. 528 (1968).

68. R. Merelman, Political Socialization and Education Climates: A Study of Two School Districts 109 (1971). *See also* Education for Democracy Project, Education for Democracy: A Statement of Principles (1987).

> political norms and more than the blind performance of appropriate political acts; it also assumes that the individual so makes these norms and behaviors his own—internalizes them—that to him they appear to be right, just, and moral.[69]

The most extensive and influential modern statement of a conservative education ideal was articulated by the nineteenth century French sociologist, Emile Durkheim. According to Durkheim, moral rules must be made by society as a whole and not by each individual.[70] Traditionally, the rules necessary to hold society together emerged from commonly-held religious notions. The weakened influence of religion by this time led Durkheim to look to the educational system to provide rational substitutes for former religious bonds: "Society can survive only if there exists among its members a sufficient degree of homogeneity; education perpetuates and reinforces this homogeneity by fixing in the child, from the beginning, the essential similarities that collective life demands."[71]

Liberals historically have rejected such statist ideals, and they have been skeptical of the political socialization function of the schools. For this reason, John Stuart Mill rejected "state education" as "a mere contrivance for molding people to be exactly like one another" and advocated the lodging of responsibility for education with each individual family.[72] Mill's perspective is shared by contemporary advocates of home instruction and other alternative education systems, who reject public education because they believe that school-based political socialization is incompatible with individual liberty.[73]

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69. R. Sigel, Learning About Politics: A Reader in Political Socialization, at xii (1970). *See also* Hess, *supra* note 67, at 528 (socialization is process of "grooming" the young for filling established roles in society).

70. E. Durkheim, Moral Education: A Study in the Theory and Application of the Sociology of Education 87 (1973).

71. E. Durkheim, Education and Sociology 70 (1956). Durkheim was not, however, rigidly collectivist. He also spoke of a need to develop a sense of individual autonomy, within a context of collectively shared goals. *See* E. Wallwork, Durkheim: Morality and Milieu 145 (1972).

72. J. Mill, On Liberty, 217 (A. Lindsay ed. 1951). *See also* J. Locke, Some Thoughts Concerning Education (1705); N. Tarkoff, Locke's Education For Liberty (1984).

Political socialization is sometimes equated by liberals with totalitarian efforts to use education to mold students' minds. Plato's approach in *The Republic* is a prime case in point. Plato advised political leaders to censor closely all literature and music in their schools in order to assure full conformity to a defined conception of "the good." Plato, The Republic 287-311 (H. Lee trans. 1955). *See also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (referring disapprovingly to educational measures of ancient Sparta).

73. *See, e.g.*, S. Arons, Compelling Belief (1983). Arons maintains that compulsory education as presently implemented is not compatible with the first amendment to the Constitution. *Id.* at 198-214.

Most contemporary liberals, however, support public education and cautiously accept the schools' political socialization function. To a large extent, the liberal acceptance of political socialization stems from the intriguing paradox that traditional American political culture is largely grounded in an individualistic, liberal ethic;[74] for this reason, the "mainstream" political attitudes which the public schools convey tend to be supportive not only of the state, but also of individualism.[75] Thus, in a liberal culture, political socialization can become a dynamic process in which the society encourages individual innovation and dissent at the same time that it seeks to convey integrative attitudes and norms. Political socialization in this sense can combine the construction of a new heritage with the transmittal of a traditional ethic;[76] it can socialize, while at the same time it partially redefines the culture.[77]

John Dewey envisioned school socialization serving these liberal goals. Dewey recognized and accepted the socialization role of the schools, noting that "without this communication of ideals, hopes, expectations, standards, opinions, from those members of society who are passing out of the group life to those who are coming into it, social life could not survive."[78] At the same time he cautioned that the education conveyed through the schools must promote individual development and must not be isolated from the "subject matter of life experience."[79]

For Dewey, schools constitute an important form of social life. They are a miniature community[80] in which students should be active participants in democratic processes, rather than passive recipients of abstract information. Thus, Dewey sought to shape both the educational environment and the formal curriculum to enhance the

74. *See, e.g.*, L. Hartz, The Liberal Tradition in America (1955).

75. F. Wirt & M. Kirst, The Political Web of American Schools 25 (1972).

76. Easton, Youth and the Political System, in Culture and Social Character 230 (S. Lipset & L. Lowenthal eds. 1961).

77. "It is not a matter of choosing between acculturation and education, but of choosing a path where we can educate about what our culture is, while helping to redefine it." D. Purpel, The Moral and Spiritual Crisis in Education 11 (1989).

78. J. Dewey, Democracy and Education: An Introduction to the Philosophy of Education 3-4 (1935). *See also* J. Dewey, The School as a Means of Developing a Social Consciousness and Social Ideals in Children, in 15 The Middle Works 1899-1924, at 150 (J. Boydston ed. 1983); J. Tussman, *supra* note 11, at 10-11.

79. J. Dewey, Democracy and Education, *supra* note 78, at 10.

80. J. Dewey, Democracy and Education, *supra* note 78, at 416. *See also* J. Dewey, The School and Society (1915); J. Dewey & E. Dewey, Schools of Tomorrow 127 (1962) ("all the educational reformers since Rousseau have looked to education as the best means of regenerating society").

student's ability to participate in the political life of the community, broadly defined.[81]

In sum, from both the conservative and the liberal perspectives, there appears to be a general consensus that schools should formulate and inculcate political values. Substantial disagreement exists, however, about precisely what those values should be and how they should be transmitted. Conservatives look at political socialization primarily in terms of developing patriotic allegiance to the nation and conveying a common background of shared history, culture and language. Liberals put more emphasis on providing an understanding of the actual workings of American political institutions as they affect the individual, and on preparation for active participation in the ongoing democratic process.

B. The Values in Conflict

1. Patriotism. When asked to outline an ideal constitution for a modern republic, Jean-Jacques Rousseau emphasized the importance of patriotism, stating that "liberty, where such patriotic fervor is absent, is merely an empty name, and laws are nothing but a mirage."[82] In post-Vietnam America, the balance of liberty and patriotism which Rousseau recommended may be difficult to achieve. Critics have charged that there is today an over-emphasis on rights and an under-emphasis on obligations and that schools no longer do an effective job of inculcating patriotic values.[83]

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81. J. Dewey, Social Purposes in Education, in 15 The Middle Works 1899-1924, *supra* note 78, at 158; C. Bowers, Elements of a Post-Liberal Theory of Education 154 (1987). *See also* P. Freire, Pedagogy of the Oppressed (1970) (freedom may only be taught through the "problem posing" method of education).

Reacting to the findings that schools convey superficial values, contemporary educators in the Deweyian tradition have developed new curricular approaches which seek to develop skills for participating in democratic institutions, such as moral deliberation, advocacy, and knowledge of group processes. *See, e.g.*, F. Newmann, Education for Citizen Action (1975). *See also* Patrick, *supra* note 31, at 206-19 (overview of innovative practices in political education in schools).

82. J. Rousseau, The Government of Poland 87 (1972).

83. *See, e.g.*, M. Janowitz, The Reconstruction of Patriotism, Education for Civic Consciousness (1983). Janowitz argues that civic education is no longer effectively taught by the schools. He advocates an extensive system of voluntary service to reconstruct the sense of patriotism in contemporary America.

There is some survey data that is inconsistent with Janowitz's pessimistic conclusions concerning the patriotic values of young Americans. A 1978 survey of 2,000 respondents aged 18 to 24 found 97% of Americans to be "proud to be an American," the highest proportion for the six countries surveyed. The other responses ranged from the 67% who were proud to be Swiss to the 90% who were proud to be British. Publ. Op., June/July 1981, at 25.

The difficulties of reconciling values of individual liberty and patriotism[84] have also been considered by the federal courts in a series of cases involving challenges to state-mandated flag salute rituals. The Supreme Court considered the first of these, *Minersville School District v. Gobitis*,[85] almost fifty years ago. Lillian and William Gobitis had been expelled from Minersville, Pennsylvania public schools for refusing to salute the American flag. As members of the Jehovah's Witness sect, they considered the pledge blasphemous and a violation of the Biblical injunction to worship no graven image.

The lower federal courts granted an injunction against the flag salute regulation,[86] but the United States Supreme Court reversed. In a decision authored by Justice Frankfurter, the Court acknowledged that two important principles were in conflict in this case, and held that the national unity principle, as reflected in the flag salute ritual, must prevail over the rights of individuals conscientiously opposed to saluting the flag on religious grounds:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization . . . .
>
> . . . .
>
> The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.[87]

Justice Frankfurter acknowledged "the great diversity of psychological and ethical opinion . . . concerning the best way to train children for their place in society."[88] Nevertheless, stating that the courtroom is not the arena for debating educational policy, he ruled that the "wisdom of training children in patriotic impulses"[89] must be left to state legislatures and local school boards.

Despite its stated neutralism on political socialization issues, the Supreme Court's decision in *Gobitis* clearly shored up conservative,

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84. "Patriotism" is defined by Janowitz, *supra* note 83, at 8, as "a primordial attachment to a territory and a society—a deeply felt and primitive sentiment of belonging; a sense of identification similar to religious, racial or ethnic identifications." Janowitz believes that patriotism can lead to various forms of belief and behavior, including both enhancement of the moral worth of the nation and a "narrow-minded xenophobia." *Id.* at 194.

85. 310 U.S. 586 (1946).

86. Gobitis v. Minersville School Dist., 21 F. Supp. 581 (E.D. Pa. 1937); Minersville School Dist. v. Gobitis, 108 F.2d 683 (3d Cir. 1939).

87. Minersville School Dist. v. Gobitis, 310 U.S. 586, 596 (1940).

88. *Id.* at 598.

89. *Id.*

and even xenophobic, patriotic perspectives in the tense days preceding America's entry into World War II:

> In Minersville, the reaction to the Gobitis ruling was swift and brutal. The Gobitises were jeered on the streets; William was beaten by schoolmates, and local churches led a boycott of his father's grocery store. And around the county a wave of anti-Witness hysteria ensued. . . . Witnesses were attacked in Illinois, tarred and feathered in Wyoming and castrated in Nebraska.[90]

The Supreme Court's validation of school board authority to impose mandatory flag salutes inspired state legislatures to pass statutes requiring the teaching of "Americanism." Compulsory flag salutes were also ordered by numerous local school boards. Approximately 2,000 Witness children were expelled from schools for refusing to salute the flag during this period.[91]

Three years after *Gobitis,* in a rapid and rare turnabout, the Supreme Court reconsidered the flag salute issue in *West Virginia State Board of Education v. Barnette,*[92] and reversed its earlier ruling. Justice Jackson's decision for the majority in *Barnette* began by noting that the local board of education's flag salute resolution contained "recitals taken largely from the Court's *Gobitis* opinion,"[93] thereby acknowledging the direct impact that Supreme Court rulings in highly-charged values clashes can have on public attitudes, despite Justice Frankfurter's stated expectation that the court's approach would leave the determination of this sensitive value issue to the legislatures and local boards. Apparently accepting this reality, Justice Jackson's decision for the new majority forthrightly addressed the competing values at stake.

The values upon which the Court focused in *Barnette* were not, as in *Gobitis,* those of patriotism and the free exercise of religion. Instead, the Court now described the issue in terms of two competing

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90. Margolick, Pledge Dispute Evokes Bitter Memories, N.Y. Times, Sept. 11, 1988, at A30.

91. D. Manwaring, Render Unto Caesar: The Flag-Salute Controversy 187 (1962). After *Gobitis,* the flag salute requirement spread to virtually all 48 states and expulsions took place in all of them. *Id.*

92. 319 U.S. 624 (1943). *Barnette* was pressed as a test case by the Jehovah's Witness' lawyers after three of the Justices signalled in a related case that they had changed their minds on this issue. *See* Jones v. Opelika, 316 U.S. 584 (1942) (Black, Douglas, Murphy, JJ., dissenting). By the time *Barnette* was decided, two other members of the *Gobitis* majority had left the Court and were replaced by Roosevelt appointees.

93. 319 U.S. at 626. The Court also noted that the West Virginia statute at issue required private, parochial, and denominational schools to prescribe courses of study "similar to those required for the public schools," thus precluding students from escaping the mandatory pledge requirement, even if they had the funds to pay private school tuition. *Id.* (citing W. Va. Code § 1734 (1941)).

political values, the transmittal of patriotic attitudes on the one hand, and individual expression on the other. Although acknowledging that national unity is a valid goal which officials may foster by persuasion and example, the Court held that patriotic ends could not be pursued by compulsion of particular beliefs:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.[94]

The Court further held that the statute "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[95]

Justice Jackson's forceful language, although reflecting an understandable reaction to the persecution of Jehovah's Witnesses throughout the country after *Gobitis,* nevertheless did not fully consider the political socialization realities of the school setting. If taken literally, a prescription against invading the "sphere of intellect and spirit" would preclude the inculcation of *any* political values in the schools; pushed even further, this language could preclude the entire role of the state in the educational process.[96]

Given the long tradition of inculcation of political values in American schools, and the Court's own endorsement in *Pierce v. Society of Sisters*[97] and later cases of the schools' obligation to teach "studies plainly essential to good citizenship,"[98] the Court cannot be understood to have intended in *Barnette* to ban all political socialization from the schools. Nor could the Court have meant to proscribe entirely flag salutes or other rituals which are traditional, effective devices for creating the "we feeling that is an important part of the political culture."[99]

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94. *Id.* at 642.

95. *Id.*

96. Justice Jackson's memorable metaphors concerning "the fixed star in our constitutional constellation" and the invasion of the "sphere of intellect and spirit" have at times complicated the analysis of political socialization issues in later cases. One commentator has noted in this regard "the anomaly of Justices who are so often critical of vagueness and lack of precision in ordinances and statutes, choosing to rely on nonliteral language . . . in their judicial opinions." Bosmajian, The Judiciary's Use of Metaphors, Metonymies and Other Tropes to Give First Amendment Protection to Students and Teachers, 15 J. L. & Educ. 439, 440 (1986). *See also* McCullum v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("a rule of law should not be drawn from a figure of speech").

97. 268 U.S. 510 (1925).

98. *Id.* at 534. *See also supra* notes 1 and 2.

99. R. Dawson, *supra* note 62, at 148.

Such, in essence, is the manner in which *Barnette* has been understood by virtually all the federal court decisions which have implemented it. State statutes by and large have continued to mandate flag salute programs,[100] and the courts have upheld these requirements so long as students and teachers who dissent for any reason, religious, political or personal, are permitted to stand aside or leave the room.[101] Thus, although some language in *Barnette* was skeptical about the value of classroom rituals,[102] the Supreme Court did allow the schools continued broad discretion to inculcate patriotic values through classroom rituals,[103] unlike the situation in the school prayer cases, where the Court banned contested activity altogether.[104]

In sum, although *Barnette* took a strong stand in favor of values of individual expression at a time of xenophobic patriotic fervor, the "common law" development of the *Barnette* doctrine over time, through its interpretation by the lower courts and its implementation by state and local education officials, has resulted in a somewhat flexible balance of liberty and patriotic values that may allow

100. *See, e.g.*, N.Y. Educ. Law § 802 (McKinney 1988) (authorizing "a program providing for a salute to the flag and a daily pledge of allegiance to the flag").

101. *See, e.g.*, Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972) (teachers' right to stand silently and not participate in flag salute upheld); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969) (student refusal to stand during pledge or leave room upheld). *See also* Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963) (Jehovah's Witnesses' refusal to stand for national anthem after standing during pledge of allegiance upheld).

Mass. Gen. L. 71, § 69 requires "each teacher" to lead the class in a flag salute at the beginning of each day. The Massachusetts Supreme Judicial Court had ruled in an advisory opinion that this statute would violate the first amendment if it required teachers to participate in the pledge of allegiance. Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977). Following issuance of the court opinion, Governor Michael Dukakis vetoed the bill. Both Houses of the Massachusetts legislature then overruled the veto. In light of the Supreme Judicial Court's advisory opinion, the Massachusetts Department of Education has interpreted the statute to require schools to provide teachers the opportunity to lead their class in a recitation of the Pledge of Allegiance, but not to mandate that any student or teacher participate. Massachusetts Department of Education Advisory Opinion on Pledge of Allegiance by Teachers (Sept. 30, 1977).

102. Justice Jackson's opinion undoubtedly was reacting to the use of compulsory rituals by totalitarian regimes during the World War II era. The flag salute was criticized at the time as "being too much like Hitler's." *Barnette*, 319 U.S. at 627. At one point in his decision, Justice Jackson noted that flag salute symbolism is a "primitive, but effective way of communicating ideas." *Id.* at 632. The only education literature actually cited in *Barnette*, however, was a single study of the impact of flag salutes on children, which Justice Jackson concluded reflected "a pathetic picture of attempts to teach children this way." *Id.* at 631 n.12.

103. The Court's decision in *Barnette* did not consider in any sophisticated way its political socialization implications, as did some later Supreme Court cases that have emphasized the political socialization role of the schools. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 79 n.9 (1979) (referring to political socialization studies).

104. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

local communities to come close to achieving Rousseau's ideal. Vigorous affirmation of patriotic values through flag salutes and other rituals need not be inconsistent with toleration of diversity and rights of individual expression.[105] The Court's decision in *Barnette* sharply clarified the competing values at stake, leaving for educators and local communities the difficult, but important task of formulating a workable way of balancing these values.

2. Freedom of expression. Traditionally, educational authorities were accorded broad discretion to determine how political values should be conveyed in their schools, and opposition to official school policies was not permitted.[106] The controversy surrounding the Vietnam War in the late 1960s caused the United States Supreme Court to reconsider this established doctrine. Deep disagreement over America's involvement in the war led at times to demonstrations and disruptions in the schools. The case that brought these legal issues to a head involved three students in Des Moines, Iowa who were suspended for publicizing their objections to the Vietnam war by wearing black armbands in school.

The federal district court that first considered the case applied the traditional doctrine and held that the suspensions were reasonable under the circumstances.[107] Although acknowledging that the inclusion of controversial subjects in the curriculum may be desirable, the court stated that how and when to do so remains within the discretion of the school authorities. They not only have a right, but they have an obligation to prevent anything that might be disruptive of a "scholarly, disciplined atmosphere within the classroom.[108]

After this decision was affirmed by an evenly divided Eighth Circuit Court of Appeals, the United States Supreme Court agreed to consider the issue. In the landmark 7-2 decision of *Tinker v. Des Moines Community School District,*[109] the Court reversed the lower court and held in oft-cited words that students do not "shed their

105. The Supreme Court's recent ruling in *Texas v. Johnson,* which upheld by a 5-4 margin an individual's right to burn an American flag as protected expression under the first amendment, further underscores the importance—and the difficulty—of maintaining this balance. 109 S. Ct. 2533 (1989).

106. *See, e.g.,* State *ex rel.* Dresser v. District Bd., 116 N.W. 232, 235 (Wis. 1908) (expulsion of high school students who had submitted poem satirizing school rules to a local village newspaper upheld). *Dresser* and similar cases are discussed in Berkman, Students in Court: Free Speech and the Functions of Schooling in America, 40 Harv. Educ. Rev. 567 (1970) *See also* Friedman, Limited Monarchy: The Rise and Fall of Student Rights, in School Days, Rule Days, *supra* note 36, at 238.

107. Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

108. *Id.* at 972.

109. 393 U.S. 503 (1969).

constitutional rights to freedom of speech or expression at the schoolhouse gate."[110]

Justice Fortas's decision for the majority in *Tinker* emphasized that there was no evidence that the petitioners' protest had interfered with the schools' work:

> Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.[111]

Under these circumstances, Justice Fortas held that the issue was more one of "primary First Amendment rights akin to 'pure speech' "[112] than of interference with the pursuit of scholarly activities. The operative standard that the Court articulated in *Tinker* was that students may express their opinions on school premises, even on controversial subjects, except where such speech or conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."[113]

The Court's ruling in *Tinker* was significant, not only because of the legal doctrine it articulated, but also because of its explicit consideration of the educational implications of its ruling. Quoting from prior decisions involving teachers' rights, the Court here specifically rejected the notion of indoctrinating students to "foster a homogeneous people,"[114] and implicitly endorsed the "Deweyian" concept that "personal intercommunication among the students" not only in the classroom but in all aspects of the school environment "is also an important part of the educational process."[115] Indeed, the "material disruption" standard which constituted the essence of the *Tinker* doctrine is fully consistent with Dewey's notion that school authorities should control student behavior indirectly by "shaping" the environment, rather than directly by issuing mandatory edicts.[116]

Justice Black's dissent in *Tinker* joined issue with his colleagues on these educational issues, as well as on the legal doctrines. Justice

110. *Id.* at 506.
111. *Id.* at 508.
112. *Id.*
113. *Id.* at 513.
114. *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).
115. *Id.* at 512.
116. *See* Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321, 340 (1979).

Black acknowledged that the black armband protest did not result in violence or physical disruption, but he noted that the armbands did "divert students' minds from their regular lessons.[117] He rejected the "material disruption" standard precisely because it did not uphold the school authorities' prerogative to determine educational priorities and to inculcate political values directly through a common curriculum. In other words, his was a "Durkheimian" approach which emphasized the need for authoritative shaping of values: "The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders."[118] Justice Black predicted that the permissiveness allowed by the majority would result in students being able "to defy their teachers on practically all orders."[119]

In the years following *Tinker,* there was substantial litigation in lower federal courts on issues such as whether the *Tinker* doctrine covered school dress codes or bans on long hair,[120] and whether it permitted advance censorship by school authorities of school publications.[121] For almost two decades, the Supreme Court refused to hear any of these cases.[122] By 1986, however, the Supreme Court decided that the time had come to take a further look at the meaning and the impact of *Tinker.* It agreed to review *Bethel School District v.*

117. 393 U.S. at 518.

118. *Id.* at 522.

119. *Id.* at 525.

120. The district and circuit courts were almost evenly split in their approaches to these cases, with about half upholding the students' rights to resist the dress codes. Despite the flurry of activity and clear conflict in the circuits on this issue, the U.S. Supreme Court denied petitions for certiorari no fewer than 11 times between 1968 and 1974. Research findings and analyses of these cases compiled by the Project on Schools, Values and the Courts are available from the author. For a discussion of the range of post-*Tinker* cases in the lower federal courts, see Haskell, Student Expression in the Public Schools: *Tinker* Distinguished, 59 Geo. L.J. 37 (1970).

121. Contrary to the general ban on "prior restraints" in most first amendment situations, the circuit courts of appeals that considered this issue generally held that school boards, through proper procedures, could require students to submit school newspapers or other forms of expression for prior administrative approval. *See, e.g.,* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971). *See also* Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Tex. L. Rev. 477, 486 (1981) (arguing that judicial review of prior restraints in school situations is more complicated than in street disruption cases). *Contra* Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972).

122. *See, e.g.,* Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979), *cert. denied,* 444 U.S. 1081 (1980); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied,* 435 U.S. 925 (1978); Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied,* 414 U.S. 1032 (1973); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970).

Fraser,[123] a case that squarely raised the question of whether first amendment doctrine should be qualified in its application "within the schoolhouse gate."[124]

The specific facts calling for a first amendment analysis in *Fraser* involved the suspension of a high school student for making a sexually suggestive speech at a school assembly. Both the federal district court and the Ninth Circuit Court of Appeals declared Fraser's suspension unconstitutional under the *Tinker* "material disruption" standard. Although student reaction to the speech was characterized as "boisterous, it [had been] hardly disruptive of the educational process."[125]

The school district's position in *Fraser* did not, however, focus solely on material disruption. The defendants also argued that they should be permitted to discipline a student for using "indecent" language in a school-sponsored activity, even if that language had not caused a disruption. The Ninth Circuit rejected this argument on the grounds that permitting school officials the "discretion to apply a standard as subjective and elusive as 'indecency' . . . would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."[126]

The Supreme Court reversed. Chief Justice Burger's majority opinion first drew a distinction between the political message of the armbands in *Tinker* and the sexual content of the student's speech in *Fraser*.[127] He then discussed the role of public schools in inculcating

123. 478 U.S. 675 (1986).

124. This question had been widely discussed by legal scholars since *Tinker*. *See, e.g.*, J. Tussman, *supra* note 11, at 107 (constitutional rights are substantially affected by passage through the schoolhouse gate); F. Zimring, The Changing Legal World of Adolescence 19 (1982) (today's adolescent knows more than the adolescent of 1900, but also has farther to go to reach maturity); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 939 (1962) ("regulations of communication addressed to [children] need not conform to the requirements of the first amendment in the same way as those applicable to adults"). Justice Stewart had originally raised this issue in *Tinker*, but the Court majority did not consider it at that time. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring). *See also* Ginsburg v. New York, 390 U.S. 629 (1968) (magazines held not obscene for adults may be proscribed for children).

125. Fraser v. Bethel School Dist., 755 F.2d 1356, 1360 (9th Cir. 1985). The only specific evidence of disruption cited was "hooting and yelling" by several students at the assembly, simulations of sexual activities by three students, and the decision by one home economics teacher to devote ten minutes to discussion of the speech because students expressed so much interest in it. *Id.* at 1359-60.

126. *Id.* at 1363.

127. 478 U.S. at 680.

the fundamental values "necessary to the maintenance of a democratic political system."[128] Quoting from a classic American history text,[129] he stated that the American public school system "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation. From this perspective, the school board's attempt to inculcate the standards of "decency" and "civility" was seen not only as transmitting legitimate character values, but also as supporting the political value of respect for the rights of others in a democratic society:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.[130]

Because "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students,"[131] the Court upheld Fraser's suspension.

Fraser directly confronted the political socialization issues that had been finessed in *Barnette* and had been only indirectly broached in *Tinker.* The Court's discussion of the schools' values inculcating role was extensive and, significantly, it combined a Durkheimian support of school authorities' responsibility to mold character with the Deweyian emphasis on the value of democratic civic responsibility. The holding narrowed the *Tinker* doctrine consistent with a conservative political socialization approach. At the same time, all but one of the "liberal" members of the Court accepted Chief Justice Burger's discussion of the values inculcating role of the schools because the specific value at issue in *Fraser,* consideration of the sensibilities of others, reflects the important Deweyian value of "teaching and maintaining civil public discourse."[132]

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128. *Id.* at 681.

129. C. Beard & M. Beard, New Basic History of the United States 228 (1968).

130. 478 U.S. at 680.

131. *Id.* at 683.

132. *Id.* at 689 (Brennan, J., concurring). Justice Stevens agreed that "a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission," *id.* at 691, but he dissented on the grounds that the student here was entitled to fair notice of the scope of this prohibition and of the anticipated penalty before he could be held accountable. Only Justice Marshall fully dissented from the majority's upholding of the values-inculcating role of the schools in regulating the content of student speech under the circumstances presented.

The trend of lower court decisions since *Fraser* has been to support a broad variety of values impositions by school officials. *See* Poling v. Murphy, 872 F.2d 757 (6th Cir.

The sharp split among the justices that had marked the Courts' earlier political socialization cases came to the fore again, however, in the *Tinker*-application case considered by the Court a year later, *Hazelwood School District v. Kuhlmeier*.[133] At issue in *Hazelwood* was a principal's deletion of two pages from a high school newspaper prior to its publication. The principal took this action because he believed that certain aspects of an article discussing student pregnancy were inappropriate for younger students. In addition, some references in this article may have identified the unnamed pregnant students. Another article about divorce quoted remarks which were derogatory to a student's father, without affording him the opportunity to respond.

The district court upheld the principal's actions,[134] the Eighth Circuit reversed,[135] and the Supreme Court reversed again. In a decision by Justice White, the Court emphasized the fact that the student newspaper here resulted from an official school activity, having been produced by students enrolled in a journalism course. Justice White distinguished *Tinker* by characterizing it as addressing "educators' ability to silence a student's personal expression that happens to occur on the school premises."[136] He characterized the case before the Court as concerning " 'educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimateur of the school."

1989) (upholding disqualification of student candidate for making "rude" and "discourteous" remarks about school administrators in speech); Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) (upholding ban of school's "Johnny Reb" symbol); Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987), *on remand*, 686 F. Supp. 1387 (D. Minn. 1987) (upholding school board authority to regulate offensive speech in underground student newspaper); Virgil v. School Bd., 677 F. Supp. 1547 (M.D. Fla.), *aff'd*, 862 F.2d 1517 (11th Cir. 1989) (upholding removal of Aristophanes' Lysistrata and Chaucer's The Miller's Tale from school curriculum materials based on school board determination of their vulgarity and unsuitability); Gano v. School Dist., 674 F. Supp. 796 (D. Idaho 1987) (upholding student suspension for wearing t-shirt falsely depicting school administrators as drunk). *Contra* Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (invalidating prior review requirements for non-school-sponsored newspapers).

133. 108 S. Ct. 562 (1988).

134. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1452 (E.D. Mo. 1985).

135. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986). The court's holding was based on its finding that no material disruption in accordance with the *Tinker* standard had occurred. This decision was consistent with the holdings of most other federal courts, which had considered high school newspapers "public fora" for student expression and therefore entitled to full first amendment protection. *See, e.g.*, Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977). *See generally* Note, Administrative Regulation of the High School Press, 83 Mich. L. Rev. 625 (1984) (discussing post-*Tinker*, pre-*Hazelwood* cases).

136. 108 S. Ct. at 569.

These activities, he held, "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting."[137]

Thus, in *Hazelwood,* the Court went further than it had in *Fraser* in upholding the school authorities' right to determine which values may properly be inculcated through school curriculum. A student's right to express publicly opinions which differ from those the school seeks to convey henceforth may be confined largely to activities occurring on school grounds which are not part of the school's core educational mission.[138]

Justice Brennan dissented from this holding in an opinion which emphasized the educational implications of the Court's decision, writing, "[t]he young men and women of Hazelwood East expected a civics lesson, but not the one the court teaches them today."[139] For him, absent material disruption, matters involving potential censorship have "no legitimate pedagogical purpose"[140] and can never be left to the discretion of school officials. Rejecting the validity of the majority's "core educational mission" distinction, Justice Brennan expressed the Deweyian view that free expression of student views in the classroom must be accomodated, even if they do sometimes interfere with the school authorities' view of their pedagogic mission.[141]

Viewed retrospectively, the Supreme Court's major free expression cases first established with clarity the significance of student free expression values in the schools, but later qualified that right to take into account aspects of competing values of respect for the

137. *Id.* at 569.

138. The emphasis on the official school sponsorship of the newspaper, as well as Justice White's specific reference to an earlier case allowing the sale of an " 'underground' newspaper" on a college campus, *id.* at 570 n.3, indicates that unofficial student publications should be free from school censorship. *Compare* Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1977) (regulation of "offensive" underground school newspaper upheld) *with* Thomas v. Board of Educ., 607 F.2d 1043, 1053 (2d Cir. 1979) (Newman, J., concurring) (distribution of underground newspapers having indecent language should not be permitted on school grounds).

139. 108 S. Ct. at 580 (Brennan, J., dissenting).

140. *Id.* at 579. The school authorities' pedagogical position can appropriately be expressed, according to Justice Brennan, by disassociating themselves from controversial positions, rather than by banning objectionable student speech. *Id.*

141. "A student who responds to a political science teacher's question with a retort 'Socialism is good' subverts the school's inculcation of the message that capitalism is better. . . . Likewise the student newspaper that, like *Spectrum,* conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values." *Id.* at 574.

rights of others and responsible citizenship. As with *Barnette,* "common law" development over time led to a balancing of an educational value that initially had been stated in largely unqualified terms with other values. In contrast to the flag salute situation, however, the "common law" qualifications here were articulated directly by the Supreme Court itself, rather than by the lower courts. In doing so, the Court explicitly considered and emphasized the political socialization responsibilities of the schools.

Taken together, *Tinker/Fraser/Hazelwood* not only articulate a qualified application of first amendment free speech doctrine to the schools, but they also provide a prime illustration of the important complementary role that courts and local school communities should play in values formulations. The Supreme Court has established as a preeminent national value that first amendment free speech rights must apply within the schoolhouse gates, but it has left to each state and each local school board broad discretion to balance that right with other local community values inculcation priorities.

3. Tolerance. Under the unique American system which vests responsibility for basic school governance in locally elected school boards, decisions concerning curriculum content or the selection of books for classroom or school library use are generally prerogatives of local school officials.[142] Although little is known about how local boards actually make these educational policy decisions,[143] courts tend to be deferential to them on the infrequent occasions that their curricular decisions are legally challenged.[144]

In recent years, however, one particular curriculum area has received extensive judicial scrutiny. As a result of an apparent national campaign to censor certain selections from school libraries, a

142. In 22 states, however, school boards must choose from an approved list of textbooks established by a state commission. H. Reichman, Censorship and Selection: Issues and Answers for Schools 9 (1988). Texas and California, the largest of these, tend to have a predominant influence on the content of all major textbooks written in the United States. Gordon, Freedom of Expression and Values in the Public School Curriculum, 13 J. Law & Educ. 523, 546-48 (1984).

143. F. Wirt & M. Kirst, *supra* note 75, at 62-63.

144. *See, e.g.,* Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (superintendent's decision to cancel musical play with sexual themes upheld); Cary v. Board of Educ., 598 F.2d 539 (10th Cir. 1979) (school board decision to delete 10 books from elective language arts curriculum upheld). *Contra* Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982) (school board decision to ban films with "offensive ideological and religious themes" invalidated).

number of cases concerning library book removal have been decided by the federal courts in the past decade.[145] A split had developed among the appellate courts on the law in this area.[146] In 1982, the Supreme Court considered the issue in *Board of Education v. Pico.*[147]

The Island Trees School Board decided to remove 11 books from its high school library (later reduced to nine) after the board president and two other members attended a conference of a conservatively-oriented parents' group where a list of excerpts from certain "objectionable" books had been distributed. When they discovered that many of the cited books were in their own high school library, the board directed the principal to remove them. Objecting to the "obscenity and bad taste" contained in the banned books, the school board president explained his reasons for removing them as follows:

> We are the elected members of a board charged with the custody of thousands of youngsters during the school day. We stand in the shoes of their parents during that time. These students do not have the same rights to be exposed to obscenities as an adult. . . . *This is the essence of the concept of community standards and local control of school boards.*[148]

The district court agreed, holding that, whether or not one accepted the Board's appraisal of the books' merits, "one of the principal functions of public education is indoctrinative, to transmit the basic values of the community. . . . A constitutionally required 'book tenure' principle would infringe upon an elected school board's discretion in determining what community values were to be transmitted."[149]

The Court of Appeals for the Second Circuit, in a split decision, decided that the matter should be remanded for a trial to determine

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145. In a 1982 survey of 860 school librarians around the country, 34% reported having had a book challenged by a parent or a community that year. FitzGerald, A Reporter at Large: A Disagreement in Baileyville, The New Yorker, Jan. 16, 1984, at 48. *See also* Nocera, The Big Book Banning Brawl, The New Republic, Sept: 13, 1982, at 20.

146. In three cases, removal decisions were invalidated by the courts: Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). Two cases had upheld such removals: Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980) and President's Council v. Community School Bd., 457 F.2d 289 (2d Cir. 1972). For a discussion of these cases, see Note, First Amendment and the Schools, 59 Tex. L. Rev. 477 (1981).

147. 457 U.S. 853 (1982).

148. Pico v. Board of Educ., 474 F. Supp. 387, 392 (E.D.N.Y. 1979) (emphasis added).

149. *Id.* at 396.

the board's motivations for removing the books.[150] The Supreme Court upheld the remand decision by a close 5-4 margin. No majority of the justices could agree, however, on the constitutional or educational principles that should apply in this situation.

Justice Brennan, writing for a plurality of four justices who supported the remand, acknowledged that local school boards "must be permitted to establish and apply their curriculum in such a way as to transmit community values,"[151] but he also said that the board's discretion "may not be exercised in a narrowly partisan or political manner."[152] Recognizing the importance of the school library in providing students access to new ideas and in "prepar[ing] students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members,"[153] Justice Brennan noted:

> Our Constitution does not permit the official suppression of *ideas*. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*.[154]

Chief Justice Burger, in a dissenting opinion joined by three other members of the Court, attacked the plurality's reasoning because "there is no guidance whatsoever as to what constitutes unacceptable 'political' factors."[155] Remarking that "virtually all educational decisions necessarily involve 'political' determinations," he predicted that the net result of the plurality's reasoning would be to

150. Pico v. Board of Educ., 638 F.2d 404 (1980).
151. Board of Educ. v. Pico, 457 U.S. at 864.
152. *Id.* at 870.
153. *Id.* at 868.
154. *Id.* at 871 (emphasis in original).
155. *Id.* at 890. Justice Powell, in a separate dissent, addressed this point further:

> But this is a standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a "narrowly partisan or political manner." Even the "Chancellor's foot" standard in ancient equity jurisdiction was never this fuzzy.

Id. at 895. Justice Powell also thought that the plurality's approach would undermine the school boards' role as "uniquely local and democratic institutions." *Id.* at 894.

cause the Court to become a "supercensor of school board library decisions."[156]

The actual result of the Court's remand for further proceedings in *Pico* was to induce the parties to work out a settlement, under which the board returned all the contested books to the library shelves on the condition that a notice would be sent to the parents of those students who checked out contested books.[157] Thus, there was no remand trial and no opportunity here to test whether the standard for determining motivation articulated by the plurality could have proved meaningful in practice.

Any attempt to assess the motivation behind a political or administrative decision is a difficult judicial undertaking.[158] Unlike analogous cases involving allegations of race[159] or sex[160] discrimination, there is no conceptual benchmark in the broad areas of book selection and curriculum priorities which defines the inappropriate behavior.[161]

Justice Brennan's decision implicitly responded to this problem by emphasizing certain concrete criteria which might provide workable parameters for assessing motivation in book removal cases. First, he indicated that suspicion of improper motivation was generated in *Pico* by the board members' attendance at a blatantly partisan political conference where certain books' contents were discussed and deemed objectionable. Second, the failure of a board to follow regular, established procedures for book selection or removal could

156. *Id.* at 885.

157. Reuter, Island Trees Board Ends Its Fight to Ban Books, Publishers Weekly, Feb. 11, 1983, at 14. After being informed by the state attorney general that the notification procedure violated a state law on the privacy of library records, the board later allowed the books to be returned without a "parent notification required" stamp. *Id.*

158. *See generally* Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). *Compare Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) (those complaining of school suppression of expression should have burden of showing that "a particular school measure was motivated by other than legitimate school concerns"). The participants at the Yale symposium were divided on the feasibility of the motivation standard of *Pico*.

159. *See, e.g.*, Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980) (finding of race discrimination in book selection).

160. *See, e.g.*, Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (anti-feminist motivations implied in cancellation of subscription to Ms. Magazine by school library).

161. One commentator noted, however, that despite these difficulties, "forcing school officials to disguise their motives may in itself be worthwhile because school authorities may otherwise be encouraged to censor in order to obtain politically favorable publicity and to drive home to students and teachers the point that certain ideas are taboo." Note, State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship, 35 Stan. L. Rev. 497, 534 (1983).

provide an objective indicator of the school board's motivations.[162] Although some commentators have argued that adherence to established procedures may provide a workable criterion for distinguishing between acceptable community values and unacceptable political inputs,[163] this solution (which also would likely foster extensive litigation to determine whether all relevant procedures were followed in each particular case) is inconsistent with the school board's traditional role as a final decisionmaker that should consider, but ultimately may reject, advice offered by advisory committees.

Pico, in contrast to the other major Supreme Court cases reviewed in this section, did not establish any fundamental values applicable to all school districts throughout the country. The decision did serve, however, to clarify the sharply competing values of community control and access to ideas at stake in curriculum areas, and it underscored the significance of the values inculcating responsibility vested in local school boards under the American system.

Justice Brennan's statements that schools should be a "marketplace of ideas"[164] and that "the Constitution protects the right to receive information and ideas,"[165] propositions which Justice Rehnquist strongly disputed,[166] raise the issue of whether schools should inculcate "tolerance" as a substantive value.[167] A distinction can be

162. The Island Trees board alledgedly had ignored the advice of its own librarians, teachers, and school superintendent who had been asked to review the books. 457 U.S. at 874. In Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979), a school board decision to delete 10 books (out of 1,285) from an approved reading list was upheld. Although there, as in *Pico,* the board had not followed all the recommendations of its teacher/parent Text Evaluation Committee, no systematic effort had been made to "exclude any particular type of thinking or book." *Id.* at 544. Similarly, the Second Circuit approved the removal of two library books in Bicknell v. Vergennes Union High School Bd., 638 F.2d 438 (2d Cir. 1980), a case decided simultaneously with the Second Circuit decision in *Pico,* because the circumstances surrounding the removal there did not create "a risk of suppressing ideas." *Id.* at 441.

163. *See, e.g.,* A. Gutmann, *supra* note 3, at 99 (advocating banning of books glorifying abhorrent ways of life, if decisions are made through consistent policies); Yudof, Library Book Selection and Public Schools: The Quest for the Archimedean Point, 59 Ind. L.J. 527, 553-59, 562 (1984) (advocating procedures making delegations of book selection decisions irrevocable). *See also* H. Reichman, *supra* note 142, at app. D (model selection and removal procedures).

164. 457 U.S. at 867 (quoting Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

165. 457 U.S. at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

166. 457 U.S at 910-13 (Rehnquist, J., dissenting).

167. The Yale symposium participants reached a strong consensus in favor of the school's obligation to inculcate the substantive value of tolerance. A number of commentators have called for judicial involvement in curricular matters to ensure that students are fairly exposed to a full range of ideas. *See, e.g.,* Gottlieb, In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools, 62

drawn in this regard between "ideological tolerance" and "institutional tolerance."[168] Ideological tolerance refers to a value that all school children should be taught, i.e., that tolerance is an important positive principle and a critical element of democracy. At the same time, if individual students, such as those holding fundamentalist religious views or radical political positions, wish to express views that dissent from ideological tolerance by claiming that there is an absolute truth on one or more issues, "institutional tolerance" should permit them to oppose the substantive value of tolerance for which the school itself should be perceived to stand.[169] In other words, schools should affirmatively convey to students that tolerance is an officially approved value at the same time that institutional procedures permit individuals to speak out against that same value.

IV. Discipline Values

A. The Conceptual Framework

The exercise of authority involves the "rightful use of power."[170] In the school setting, it is generally agreed that assertions of authority by teachers, principals and other school officials should further

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N.Y.U. L. Rev. 497 (1987) (calling for application to public school book selection of "fairness" test similar to fairness doctrine in broadcasting); Kammenshine, The First Amendment's Implied Political Establishment Clause, 67 Calif. L. Rev. 1104 (1979) (calling for balanced curricular and textbook treatment on race relations and women's rights); Stern, Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents, 14 Harv. C.R.-C.L. L. Rev. 485 (1979) (school curriculum should reflect "views and voices which are representative of the community" in accordance with fairness doctrine); Van Geel, The Search for Constitutional Limits on Governmental Authority to Inculcate Youth, 62 Tex. L. Rev. 197 (1983) (calling for fairness principle requiring presentation of all sides of issues). *Compare* Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L.J. 663 (1987).

168. This distinction between aspects of tolerance was suggested at the Yale symposium.

169. There was, however, disagreement among the educators at the symposium about how far accommodation of dissenters should extend. One participant thought that students or parents objecting to the content of particular courses (for example, studying aspects of Christianity in a course on European history) should be permitted to transfer out of the class to which she objects. Other educators thought exposure to such curriculum materials should be mandatory, especially where such exposure is necessary to a full understanding of the course.

170. Grant, The Character of Education and the Education of Character, Am. Educ., Spring 1981, at 39. "Authority," therefore, must be distinguished from "authoritarianism," which connotes an illegitimate use of power. *See also* E. Durkheim, *supra* note 70, at 29 (authority is "that influence which imposes upon us all the moral power that we acknowledge as superior to us"); J. Raz, *supra* note 56, at 40 (authority defined in terms of individual's willingness to obey her superior even if she does not agree on merits of performing actions required by the authority); J. Rich, Discipline and Authority in

the "moral order"[171] and establish a proper atmosphere for instruction and learning. Whether particular exercises of authority or authority relations in specific schools are "rightful" is a matter of contemporary disagreement, however, because of a lack of consensus on the nature of the "moral order" and on the discipline values that should support it.

From the traditional perspective, discipline involves the interrelated functions of creating "conditions essential to the orderly progress of the work for which the school exists . . . [and inculcating] fundamental lessons of self-control. . . ."[172] Enforcement of disciplinary rules and upholding the "dignity and grandeur" of the teacher as an authority figure are considered essential to the achievement of these ends.[173] Moral discipline of this type has taken on added significance in modern democratic societies, according to Durkheim, because of the demise of other traditional constraints.[174]

This traditional perspective constituted a largely unquestioned consensus until the advent of the progressive movement in the 1920s and 1930s. Progressives attacked the traditional rule-bound classroom environment as "despotism in a state of perilous equilibrium."[175] They rejected what they considered the puritan heritage of "humiliating punishment" and unlimited adult domination[176] in favor of a counter-ideal of "individual autonomy," free of the authority strictures of the past.[177]

Dewey's writings epitomized this new perspective. He rejected the traditional focus on the inculcation of rules and disciplinary training, and stressed instead the internal discipline of the autonomous individual:

> Discipline means power at command . . . discipline is positive. To cow the spirit, to subdue inclination, to compel obedience, to mortify the

School and Family 37-55 (1982) (authority defined as "the framework for legitimating discipline").

171. M. Metz, Classrooms and Corridors: The Crisis of Authority in Desegregated Secondary Schools 27 (1978).

172. W. Bagley, School Discipline 10 (1915). *See also* E. Durkheim, *supra* note 70, at 49 (through the practice of moral rules, we develop the capacity to govern and regulate ourselves, which is the whole reality of liberty).

173. J. Kennedy, The Philosophy of School Discipline 15 (1980). *See also* E. Durkheim, *supra* note 71, at 89 (1956); A. Guskin & S. Guskin, A Social Psychology of Education (1970).

174. E. Durkheim, *supra* note 70, at 49.

175. W. Waller, The Sociology of Teaching 10 (1932).

176. Ladd, Regulating Student Behavior Without Ending Up in Court, 54 Phi Delta Kappan 304, 308 (1972).

177. *See* K. Benne, Authority in Education, 40 Harv. Educ. Rev. 385 (1970).

> flesh, to make a subordinate perform an uncongenial task—these things are or are not disciplinary according as they do or do not tend to the development of power to recognize what one is about and to persistence in accomplishment.[178]

For Dewey and his followers, the child was considered the principal agent of his own education and mental development, and the prime task of the school was to create an environment that would allow the child to work out the solution of each situation for himself in his own way. This environment of relative freedom for the child implied a new concept of school discipline which, consistent with the Deweyian emphasis on democracy in the schools, sought to eliminate much of the traditional structure of "regimen and regimentation."[179]

The progressives' criticisms were, in part, a reaction against the trends toward a rote system of instruction and standardization in terms of grading, curriculum, and school organization which had become dominant in urban schools at the turn of the century.[180] Today, despite a lessening in traditional regimentation, critics still charge contemporary schools with a "preoccupation with order and control."[181] Modern school systems, especially those in urban areas, are said to provide a form of "bureaucratized education" which is incompatible with effective learning.[182]

Recent criticism of authority relations in the schools has often been articulated as a theory of a "hidden curriculum."[183] According

178. J. Dewey, Democracy and Education, *supra* note 78, at 151-52.

179. W. Waller, *supra* note 175, at 452.

180. The oppressive climate of many urban schools was illustrated by the fact that out of 500 non-attending children working in factories and sweatshops who were interviewed in 1909, 412 said they preferred the factory to the school and 269 gave as a specific reason for this preference that no one hit them at the factory. D. Tyack, *supra* note 23, at 177.

181. C. Silberman, Crisis in the Classroom 122 (1970). Silberman considers the clock to be one of the most important of such controls. He states that "a major part of the teacher's role is to serve as traffic manager and timekeeper, either deciding on a schedule himself or making sure a schedule others have made is adhered to." *Id.*

182. *See, e.g.*, D. Seely, Education Through Partnership: Mediating Structures and Education 21-28 (1981). *Contra* March, American Public School Administration: A Short Analysis, 86 School Rev. 217 (1977); Meyer & Brown, The Structure of Educational Organizations, in Environments and Organizations (M. Meyer ed. 1980); Weick, Educational Organizations as Loosely Coupled Systems, 21 Admin. Sci. Q. 1 (1976) (arguing that school systems do not contain the formal, hierarchical command structure of traditional corporate or governmental bureaucracies).

183. *See* M. Apple, Education and Power (1982); M. Apple, Ideology and Curriculum (1979). The student unrest of the 1960s was often described as a somewhat understandable reaction to the oppressiveness of the hidden curriculum. *See, e.g.*, Marker & Mehlinger, Schools, Politics, Rebellion and Other Youthful Interests, in The School and the Democratic Environment 44 (1970).

to this view, the schools' emphasis on testing, tracking, and organized routines teaches hierarchy and inequality, rather than diligence, punctuality and self-control.[184]

The hidden curriculum perspective emerged from the counter-culture movement of the late 1960s. "The educational side of the movement against the war in Vietnam" created a youthful revolt against authority which has had a lasting impact on the culture of the schools.[185] Students' assumptions about their elders' wisdom and goodwill were radically undermined during that period, and many of the reform perspectives of that era went well beyond Deweyian liberalism in their radical reorganization of school structures and in their lack of attention to values of regularity and discipline, whether external or internal.[186]

A reaction to these counter-culture perspectives took hold in the late 1970s. Many educators bemoaned the atmosphere of permissiveness and lack of control in many of the nation's schools, and concluded that a "discipline crisis" existed in the schools.[187] The traditionalist revival was supported by a number of studies which found that students who attended schools which emphasized consistent rules and routines exhibited better behavior and achieved higher academic success than those in more open settings.[188]

Conflicts on discipline values often have also been exacerbated by the school desegregation process. Desegregation brings together students and teachers from differing cultural backgrounds, who often have diverse perceptions of what constitutes behavior threatening to the moral order or to a proper educational atmosphere. In addition, the confrontational climate which has surrounded some desegregation efforts renders the creation of consensus on discipline values, at least in the short run, especially difficult.[189]

184. Merelman, Democratic Politics and the Culture of American Education, 74 Am. Pol. Sci. Rev. 319, 320 (1980) ("students cannot learn democracy in the school because school is not a democratic place").

185. D. Ravitch, The Schools We Deserve: Reflections on the Educational Crises of Our Time 36 (1988).

186. *See, e.g.*, J. Herndon, The Way It Spozed to Be (1968); I. Illich, Deschooling Society (1970); G. Leonard, Education and Ecstacy (1968).

187. *See* J. Dobson, Dare to Discipline (1970); J. Jones, Discipline Crisis in the Schools: The Problem, Causes and Search for Solutions (1973).

188. *See* J. Coleman, T. Hoffer & S. Kilgore, High School Achievement and Private Schools (1981); M. Rutter, B. Maughan, T. Mortimer & J. Ouston, Fifteen Thousand Hours: Secondary Schools and Their Effects on Children 191-94 (1979).

189. *See, e.g.*, Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (Black students suspended for walking out of pep rally during playing of "Dixie"). For a detailed examination of the complications created by desegregation, see M. Metz, *supra* note 171.

The extensive implementation of desegregation in the late 1960s and early 1970s was accompanied by substantial increases in the numbers of students suspended or expelled from school.[190] Blacks were suspended at twice the rate of any other group.[191] The implications of these statistics remain controversial. It is not clear whether the high suspension rates reflect an appropriate exercise of authority, necessary to establish order during a time of stress, or an authoritarian—or racist—overreaction, which increased the level of confrontations and undermined effective discipline.

The desegregation confrontations thus brought to the fore the lack of consensus on discipline values. Underlying the classic debate between traditional rule-oriented Durkheimians and liberal autonomy-oriented Deweyians is the fundamental question as to how a "shared moral order," necessary for the exercise of rightful authority, can be maintained in today's heterogeneous, culturally diverse public school settings.[192]

B. The Values in Conflict

1. Due process. As with political values, disciplinary procedures and the imposition of punishments were traditionally deemed matters within the exclusive discretion of school authorities. So long as school officials acted in good faith, courts would not second guess their decisions.[193] By the middle of the twentieth century, this

190. For example, a survey of 2,862 school districts by the federal Office of Civil Rights found that one of every 13 secondary students was suspended at least once during the 1972-73 school year (not counting expulsions or drop-outs). Children's Defense Fund, School Suspensions: Are They Helping Children? 10 (1975). The Children's Defense Fund also stated that two million children missed 25% or more of the school year. *Id.* at V. The Dallas Times Herald reported a four-fold increase in incidents of corporal punishment from 5,308 in 1970-71 to 24,305 in 1971-72 "because of the general unrest and rise in disruptions as a result of new desegregation rules," *cited in* J. Jones, *supra* note 188, at 46.

191. Children's Defense Fund, *supra* note 190, at 9. The CDF Report stated that approximately half of all school suspensions were for non-dangerous, non-violent offenses such as truancy, tardiness, pregnancy, and smoking, which do not have a serious disruptive effect on the educational process. *See id.* at 38. *See also* Yudof, Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution, 39 Law & Contemp. Probs. 374 (1975).

192. The decline in the status of teaching and in the calibre of those entering the profession also has had an impact on the schools' ability to maintain effective discipline. *See, e.g.*, G. Maeroff, The Empowerment of Teachers (1988) (describing implications of low status of teachers); M. Janowitz, *supra*, note 83, at 165. The status of teachers in the eyes of their students is also affected by the growing tendency to equate success and worth with monetary reward. G. Maeroff, *supra*, at 19-20. *Cf.* M. Metz, *supra* note 171, at 80 (upper class students see themselves as not qualitatively different from teachers).

193. For example, in 1923, when a high school girl who was expelled for violating a school rule against wearing "face paint" or cosmetics sought reinstatement, the Arkansas Supreme Court emphatically rejected her petition, stating, "Courts have other and

concept of unreviewable administrative discretion had, however, become incompatible with judicial notions of fairness in administrative procedures.[194] The first major break in the pattern of traditional judicial deference to school authorities came, at the beginning of the civil rights era, in the case of *Dixon v. Alabama State Board of Education.*[195] That case involved a number of black students who had been expelled from a tax-supported college for taking part in a lunchroom sit-in and civil rights demonstration. The United States Court of Appeals for the Fifth Circuit held that the students were entitled to a formal administrative hearing to determine the validity of the evidence against them.

After *Dixon,* the courts were still in dispute as to whether due process procedural requirements should be extended to the daily disciplinary processes of the elementary and secondary schools. The United States Supreme Court answered that question in the affirmative with its 1975 decision in *Goss v. Lopez.*[196] Perhaps not coincidentally, the litigation in *Goss* also arose out of a situation of racial conflict, in this case the implementation of desegregation in the Columbus, Ohio public school system. Following a series of demonstrations and vandalism incidents, triggered by the school administration's cancellation of certain events organized for Black History Week, a large number of students were suspended.[197] Despite this background of racial confrontation (and the NAACP's role in initiating the lawsuit), the case was litigated as a narrow due process issue, rather than as a broad racial equality case.

The named plaintiff, Dwight Lopez, was one of more than 75 students suspended from Central High School. The evidence indicated that Lopez had been in the school lunchroom when several black students entered and began overturning tables. He testified that he and several of his friends walked out of the lunchroom and took no part in the unlawful activity. Nevertheless, Lopez was suspended,

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more important functions to perform than that of hearing complaints of disaffected pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools . . . ." Pugsley v. Sellmeyer, 250 S.W. 538, 539 (Ark. 1923).

194. *See, e.g.,* Seavey, Dismissal of Students: Due Process, 70 Harv. L. Rev. 1406, 1407 (1957) ("It is . . . shocking to find that a court [denies] a student the protection given to a pickpocket."). For discussions of the expansion of judicial concepts of administrative due process, see Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge:* Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976) and Reich, The New Property, 73 Yale L.J. 733 (1964).

195. 294 F.2d 150 (5th Cir. 1961).

196. 419 U.S. 565 (1975).

197. Zimring & Solomon, *Goss v. Lopez:* Bringing the Issue to Court, in In the Interest of Children 460 (R. Mnookin ed. 1985).

and two weeks later, his mother received a letter from the Director of Pupil Personnel transferring him to the adult day school.[198] Evidence was also presented concerning eight other members of the plaintiff class who had been suspended during the period of disturbances. Some of these students claimed to have been innocent bystanders, while others admitted to taking part in the events to varying degrees.

Plaintiffs claimed that all of these suspensions were unconstitutional because none of the students had been granted the minimal due process guaranteed by the fourteenth amendment to the Constitution of the United States.[199] The suspensions appeared to have significant educational implications since, in Columbus, students received zeros for all work missed during a suspension and were not afforded the opportunity to make up the work.[200] The defendants, however, contended that these particular suspensions had no demonstrable effect on the students' actual academic achievement.[201] Defendants also claimed that their suspension procedures, even if not providing the type of legal factfinding which plaintiffs sought, served important educational purposes in seeking "to remedy the problem and [trying] to find a solution so that the student is successful in his schooling."[202]

Thus, *Goss* squarely posed the fundamental conflict between the traditional view that discipline is an integral part of the educational process which should be left to the discretion of the school authorities and the progressive view that discipline is an aspect of personal development which is best promoted by procedures which emphasize respect for individual rights. The school authorities, faced with

198. Lopez v. Williams, 372 F. Supp. 1279, 1285 (S.D. Ohio 1973).

199. The fourteenth amendment provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

200. 372 F. Supp. at 1292. Plaintiffs also presented evidence that suspension from school results in substantial psychological harm to students in terms of lowered self-esteem, feelings of powerlessness, and an orientation to withdrawal as a mode of problem solving; they also claimed suspension leads to resentment against school authorities and becomes a self-fulfilling prophecy in stigmatizing the student as a troublemaker. *Id.*

201. *Id.* at 1291.

202. *Id.* at 1283. Under Ohio law at the time pupils could be expelled for a semester or suspended for up to 10 days, provided that parents were notified within 24 hours and given an opportunity to appeal to the Board of Education. Local procedures adopted by the Columbus Board of Education after the suspensions at issue in this case, but prior to the courts' decisions, required the principal to provide the parents with exact reasons for the suspension and a right to a conference upon request. *Id.* at 1282. For a detailed analysis of a post-suspension guidance conference, distinguishing it from a "quasi-judicial hearing" with right to counsel, see Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967).

a dangerous situation of racial tension and potentially violent confrontation, acted quickly, and apparently effectively, to quell the disturbances. Once order was reestablished, they focused on the educational needs of the students. In this process, however, some innocent bystanders may have been swept into the suspension dragnet and their schooling records—and arguably their academic accomplishments—may thereby have been adversely affected.

The three-judge court that first ruled on the case held that although suspension from school for a short period of time is a lesser interference with the right to education than the expulsion involved in *Dixon,* "the due process clause of the Fourteenth Amendment still cloaks the student."[203] The Supreme Court affirmed this holding by a close 5-4 margin.

In a decision written by Justice White, the Court held that even short-term suspensions of 10 days or less trigger a constitutional right to due process of law."[204] Specifically, the Court determined that where a state has extended a right to education to all students of a certain age, the student obtains both a "property interest" in continued educational benefits and a "liberty interest" in his academic record, which precludes the state from withdrawing the right to education "on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.[205] Although the Court upheld the students' due process rights, it also took note of the complexity of contemporary schools, the importance of maintaining "[s]ome modicum of discipline and order," and indicated that suspension is a "necessary tool to maintain order [and] a valuable educational device."[206]

Thus, the *Goss* decision explicitly sought to balance traditional concepts of educational authority with constitutional precepts of procedural fairness and individual rights. The specific remedy mandated by the Court reflected this attempted equilibrium. In articulating precisely how much process was due to students in regard to short suspensions, the Court decreed a procedure that allowed maximum flexibility for administrative judgment:

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203. 372 F. Supp. at 1299.

204. Goss v. Lopez, 419 U.S. 565 (1975). Following *Dixon,* the federal courts had been split on the applicability of the fourteenth amendment to short-term school suspensions. For example, compare Shanley v. Northwest Indep. School Dist., 462 F.2d 960, 967, n.4 (5th Cir. 1972) (due process applicable to three-day suspension) with Linwood v. Board of Educ., 463 F.2d 763 (7th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972) (Constitution inapplicable to "minor" seven-day suspension).

205. 419 U.S. at 574.

206. *Id.* at 580.

> [I]n connection with a suspension of 10 days or less . . . the student [must] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story . . . . There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases, the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred."[207]

In essence, the constitutional requirement of *Goss* consists of oral notice of charges and an informal opportunity for a quick, impromptu discussion of the issues. Beyond the initial short dialogue, there were no further procedural mandates: there was no requirement that a written statement of reasons be sent to the parents, that any kind of formal administrative hearing be convened, or that the student be represented by counsel.[208] In fact, as the Court itself pointed out, the type of notice and hearing procedure articulated in *Goss* was "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[209]

Despite the minimal extent of the procedural requirements imposed by the majority opinion, four members of the Supreme Court dissented and criticized the majority for unneccessarily opening "avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education."[210] Justice Powell, writing for the dissenters, considered short-term suspensions to constitute a minor occurrence which would rarely affect a pupil's

207. *Id.* at 581-82. The Court also stated that in the case of "students whose presence poses a continuing danger to persons or property, or an ongoing threat of disrupting the academic process . . . the necessary notice and rudimentary hearing should follow as soon as practicable." *Id.* at 582-83. The Court further noted that longer suspensions or expulsions might require more formal procedures, although it did not reach that issue. *Id.* at 583-84.

208. The "rudimentary" procedure which a student was guaranteed prior to expulsion from a state college or university in *Dixon* consisted of notice with specific charges, names of witnesses against him, and a right to present witnesses or written affidavits on his behalf. *See also* Buss, Procedural Due Process for School Discipline: Probing the Constitutional Outline, 119 U. Pa. L. Rev. 545, 593-627 (1971) (discussing four basic components of procedural due process beyond notice, i.e., right to cross examination, right to counsel, assurance of impartial tribunal and requirement that formal record be made for review).

209. 419 U.S. at 583. The *Goss* procedure is nearly identical to a procedure that the principal of one of the Columbus high schools had stated was the general practice in his school, although it had not been followed in this case. Under the school district memoranda issued following the events in *Goss*, but before the Supreme Court's decision, requirements at least as stringent as those now called for by the Court were already required in the Columbus school system. *See id.* at 567 n.1.

210. *Id.* at 585.

educational opportunities or scholastic performance."[211] For him, the real educational issue here was the undermining of the traditional authority of teachers and administrators to inculcate discipline values:

> One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life . . . . When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite challenge to the teacher's authority—an invitation which rebellious or even merely spirited teenagers are like to accept.[212]

Given the minimal, informal nature of the procedures actually imposed by the majority decision, the vehemence of the dissent may seem "out of all proportion to the narrow rights recognized in that case."[213] Justice Powell's concern, however, was not with the content of the procedures actually imposed, but with the insertion of an adversary dimension into the "normal teacher-pupil relationship . . . in which the teacher must occupy many roles—educator, advisor, friend and, at times, parent substitute."[214]

Justice Powell was also concerned about the Court entering a new "thicket" which, in his view, could have a dramatic, negative impact on the educational process."[215] The *Goss* decision, he feared, would "sweep within the protected interest in education a multitude of discretionary decisions in the educational process," including grades, promotion decisions, choices of academic subjects, exclusion from interscholastic athletics and academic transfers.[216]

Fourteen years after *Goss* was decided, it appears that the decision has been effectively implemented and broadly accepted by educators,[217] and that implementation has noticeably affected, although it

211. *Id.* at 589. He noted that the "record in this case reflects no educational injury to appellees. Each completed the semester . . . and performed at least as well as he or she had in previous years." *Id.*

212. *Id.* at 593 (citation omitted).

213. *See* Letwin, After *Goss v. Lopez:* Student Status as Suspect Classification?, 29 Stan. L. Rev. 627, 638 (1977).

214. 419 U.S. at 594. The Court majority, reflecting more of a Deweyian perspective, apparently thought that a guarantee of minimal due process rights, especially during a period of tense racial confrontations, was a means for restoring trust in faculty-student relationships, thereby promoting order. Wilkinson, *Goss v. Lopez:* The Supreme Court as School Superintendent, 1975 Sup. Ct. Rev. 25, 31.

215. 419 U.S. at 597.

216. *Id.*

217. Although the Yale symposium participants were a small sample, it is noteworthy that there was a unanimous consensus among them—including those who thought that procedural requirements dissuaded teachers from taking the time and effort to pursue sanctions against misbehaving students in particular cases—that basic due process

has apparently not dramatically restricted, the disciplinary prerogatives of school administrators.[218] The Supreme Court majority's attempt in *Goss* to craft a minimal remedy that would add a sense of procedural fairness to the schooling atmosphere, without overly interfering with the substance of disciplinary procedures, thus has proved successful. Part of the reason for this result may have been that the Supreme Court's intent was well understood and faithfully implemented in the "common law" development of the *Goss* doctrine by the lower federal courts over the past 14 years. The courts have flexibly applied the requirements of *Goss*,[219] refused to impose any additional procedural mandates,[220] and rejected claims that short-term suspensions occurring during final exam periods require greater due process.[221]

A review of the post-*Goss* federal cases indicates that most of Justice Powell's fears of judicial expansion into a "thicket" of educational decisionmaking have not materialized. Federal courts have

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procedural requirements were appropriate and necessary in the schools. Even those symposium particpants who expressed strong conservative views on other issues rejected Justice Powell's argument concerning the incompatibility of due process requirements with proper discipline; their concern was with motivating teachers and administrators to use fully available procedures, and not with eliminating or modifying them. The educators' acceptance of due process for students may reflect, at least in part, the value that teachers place on due process guarantees for their own job security. Although some educators criticize judicial intervention on behalf of student rights, "legalization" in schools today results in part from statutory and contractual procedural protections for teachers. *See also* Kegan, Regulating Business, Regulating Schools, The Problem of Regulatory Unreasonableness, in School Days, Rule Days, *supra* note 36, at 65 (broad regulatory environment and not judicial activism causes "legalization").

218. For example, in Columbus, Ohio, the origin of *Goss*, the total number of suspensions rose from 6,000 in 1976, Zimring & Solomon, The Principle of the Thing, in In the Interest of Children, *supra* note 197, at 502, to approximately 10,000 in 1986. National Coalition of Advocates for Students, A Special Analysis of 1986 Elementary and Secondary School Civil Rights Survey Data, 100 Largest School Districts. Columbus's 1986 suspension rate of 15.49% ranked it fifth of the 100 largest cities. Approximately 55% of the students suspended were black. (Columbus's suspension rate for blacks was 18.89% and for whites 13.06%). *Id.* at 2. The sample of 20% of all districts in the country showed an average suspension rate of 4.85% and a black suspension rate of 9.1%. *Id.* at 1.

219. *See, e.g.*, Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986) (no notice or hearing necessary where student admits the accusation); White v. Salisbury Township School Dist., 588 F. Supp. 608 (E.D. Pa. 1984) (hearing occurring one day after suspension deemed prompt enough to meet due process requirements of *Goss*).

220. *See, e.g.*, Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982) (claim that *Goss* prohibits questioning of student absent *Miranda*-type warnings or parental involvement rejected); Kirtley v. Armentrout, 405 F. Supp. 575 (W.D. Va. 1975) (detailed notice of pending charges not required).

221. *See, e.g.*, Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1080 (5th Cir. 1984). *See also* Lamb v. Panhandle Community Unit School Dist., 826 F.2d 526, 528-29 (7th Cir. 1987) (three day suspension during final exam period, precluding student from graduating, upheld).

repeatedly held that *Goss*' procedural rights do not cover partial denials of educational opportunities. Thus, they have repeatedly rejected procedural protections regarding participation in extracurricular activities,[222] including athletics,[223] and they have refused to recognize a constitutionally-protected right to enroll in a particular school or course of study.[224]

A further reason why *Goss* may not have had the dramatic impact on the broad range of school practices predicted by Justice Powell and some commentators is that the Supreme Court quickly placed a skid on any possible "slippery slope" in this area by holding three years after *Goss* that the courts would not impose due process requirements on academic grading decisions. In *Board of Curators v. Horowitz,*[225] it ruled that a medical student dismissed because of deficiencies in her clinical performance was not entitled to constitutional procedural protections, even though the interest at stake was substantially greater than the short-term suspension in *Goss*. Distinguishing *Goss,* Justice Rehnquist's majority decision held that unlike the typical factual questions presented in the average disciplinary decision, "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[226] Accepting in this context the potential intrusiveness of adversary legal processes, the Court majority held, "We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[227]

222. *See, e.g.*, Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986) (students barred from attending school basketball game not entitled to due process hearing); Bernstein v. Menard, 557 F. Supp. 90 (E.D. Va. 1982) (claim of due process rights by student dismissed from high school band held to be frivolous). *Contra* Boyd v. Board of Directors, 612 F. Supp. 86 (E.D. Ark. 1985) (25 black football players entitled to hearing after suspension for protesting racially biased homecoming queen election).

223. The courts have consistently held that rules limiting the right to engage in interscholastic athletic competitions for a year after transfer to a different institution do not raise cognizable due process issues. *See, e.g.*, Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980); Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).

224. *See, e.g.*, Daniels v. Morris, 746 F.2d 271, 277 (5th Cir. 1984) (access to public school in district of former residence); Arundar v. DeKalb County School Dist., 620 F.2d 493, 494 (5th Cir. 1980) (enrollment in particular technical course of study); Bouza v. Morales Carrion, 578 F.2d 447, 452 (1st Cir. 1978) (access to university-affiliated laboratory school); Jones *ex rel.* Michele v. Board of Educ., 632 F. Supp. 1319, 1323 (E.D.N.Y. 1986) (access to single sex institution).

225. 435 U.S. 78 (1978).

226. *Id.* at 90.

227. *Id. See also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (upholding refusal to permit medical student to retake exam).

Thus, in *Horowitz,* the Supreme Court quickly interpreted and confined the precedential impact of its *Goss* ruling. In contrast to its two decades of delay in developing the *Tinker/Fraser/ Hazelwood* doctrine for applying the first amendment to the schools,"[228] the Court here telescoped the "common law" developmental process. Why the Court moved quickly to convey a message of moderation after *Goss,* but not after *Tinker,* may reflect nothing more than the vagaries of the Court's informal process of choosing cases for review; it is also possible, however, that the difference resulted from an awareness of the precariousness of authority relations in the schools and a desire to ensure that *Goss* would not have a radical impact on discipline values.

2. Corporal punishment. Two years after its decision in *Goss,* the Supreme Court also refused to extend the *Goss* precedent to corporal punishment situations. In *Ingraham v. Wright,*[229] it held that notice and hearing requirements need not be imposed prior to paddling, and that corporal punishment in the schools does not violate the eighth amendment's prohibition against cruel and unusual punishment. Although the Court found that students' liberty interests were at stake, traditional common law remedies, which could provide monetary damages for excessive punishments, were held to constitute sufficient relief.

On its face, the *Ingraham* decision seems difficult to reconcile with *Goss.*[230] A minimal loss of time in school, which was not shown to have resulted in any actual educational detriment, was considered sufficient to trigger due process procedural protections in the latter case, but corporal punishment which may have caused a hematoma, absence from school for several days, and deprivation of the use of an arm for a week were held not to justify constitutional protection in the former.[231] Why were procedural requirements imposed in

228. *See supra* text accompanying notes 106-41.

229. 430 U.S. 651 (1977). The decision was 5-4, with Justice Stewart joining the four justices who dissented in *Goss* to compose a narrow majority.

230. Justice Powell, writing for the majority, stated that requiring hearings prior to imposing corporal punishment would divert time from normal school pursuits and might deter teachers from disciplining unruly students. *Id.* at 680-81. These factors would also, however, be true of due process requirements for suspensions. *Id.* at 693 n.10 (White, J., dissenting).

231. *Id.* at 657. Students offered a choice between paddling and suspensions often choose the latter. *See, e.g.,* Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1079 (5th Cir. 1984). Some commentators have concluded that *Ingraham* implicitly overruled *Goss. See* Alexander & Horton, *Ingraham v. Wright:* A Primer for Cruel and Unusual Jurisprudence, 52 S. Cal. L. Rev. 1305, 1390-93 (1979). *See also* Rosenberg, *Ingraham v. Wright:* The Supreme Court's Whipping Boy, 78 Colum. L. Rev. 75, 90 (1978).

the first instance but not in the second, seemingly more compelling, situation?[232]

The answer may lie in the greater degree of controversy on the substantive values issues at stake in the two cases.[233] A holding that invalidated corporal punishment as being "cruel and unusual" under the eighth amendment, or even one that restricted its use by invoking procedural requirements under the fourteenth amendment, would have been perceived as a basic rejection by the Court of the concept of corporal punishment. In contrast to the situation in *Goss,* where the minimal due process procedures adopted by the Court approximated the normal procedural practices in most schools, including the Columbus district itself,[234] an invalidation of corporal punishment would have challenged practices in a majority of the states.[235] The Court explicitly noted that opinion surveys consistently have shown a majority of teachers and of the general public favoring moderate use of corporal punishment in the lower grades,[236] and that 21 of 23 states that have addressed the problem through legislation have authorized the use of corporal punishment.[237]

In *Goss,* the Court established uniform requirements for procedural due process, but since the procedures are minimal, they allow maximal scope for continuing local discretion in discipline matters. A uniform national rule regarding corporal punishment, by way of contrast, may have substantially impeded the values prerogatives of a large portion of local school districts. This the Court was not willing to do.[238]

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232. In Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.) (three-judge court), *aff'd,* 423 U.S. 907 (1975), the Supreme Court had affirmed, without opinion, a decision which had required as minimal procedures: (1) advance notice of offenses that could lead to use of corporal punishment; (2) the presence of another teacher or principal who must be informed in the student's presence of the reasons for the punishment when the punishment is inflicted; and (3) upon request by the child's parents, an explanation by the disciplinarian of his reasons and the name of the second official.

233. It may also be that the Court declined to impose a procedural requirement in *Ingraham* precisely because it had already done so in *Goss.* As with *Horowitz,* the Court may have intended in *Ingraham* to convey a message of moderation to the lower federal courts and to the schools concerning the intent behind *Goss.*

234. *See supra* note 209.

235. 430 U.S. at 660 ("the practice continues to play a role in the public education of school children in most parts of the country").

236. *Id.* at 661 n.17. Note that the largest professional teachers organization, however, had gone on record as opposing corporal punishment. National Education Association, Report of the Task Force on Corporal Punishment (1972).

237. 430 U.S. at 662.

238. Although the Court rejected eighth amendment and procedural due process claims in *Ingraham,* it declined to rule on a substantive due process argument against excessive punishment. Noting this omission, at least two courts of appeals have applied the substantive due process doctrine to corporal punishment in other cases. *See* Garcia

3. Student privacy. The Supreme Court faced the issue of a student's right to privacy within the school in *New Jersey v. T.L.O.*[239] "T.L.O." was a fifteen-year-old New Jersey high school student who was found in possession of marijuana by a vice principal after a search of her purse. In addition to being suspended for a short time, she was charged with intent to distribute marijuana. Prior to her state criminal trial, her attorneys challenged the validity of the search under the fourth amendment because of the lack of a search warrant and the absence of a showing of "probable cause" to believe that a crime had been committed.[240] *T.L.O.,* therefore, raised directly the extent to which fourth amendment standards are applicable to searches conducted on school premises, an issue with significant implications for discipline values in the schools.

The case arose from a teacher's observation of T.L.O. and another girl smoking cigarettes in the girls' room in violation of the school's rule against smoking in lavatories. Consistent with *Goss* procedures, T.L.O. was promptly brought to the vice principal's office and asked to explain her version of the events, whereupon she denied smoking at all. In response to this denial, the vice principal searched the student's purse and found a pack of cigarettes. After he removed the cigarettes, marijuana and marijuana paraphernalia became visible. Further inspection revealed a handwritten letter from T.L.O. to a friend asking her to sell marijuana in school. At this point, the vice principal summoned the police and turned the marijuana and other evidence over to them.

The New Jersey Supreme Court considered two major issues in regard to the manner in which this search was conducted.[241] The first was whether evidence illegally obtained in school searches should be excluded from criminal proceedings, as is evidence obtained during other illegal searches. The second issue was the appropriate standard for assessing whether a school-based search is illegal.

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v. Miera, 817 F.2d 650 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). *Compare* Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988) (equal protection challenge to corporal punishment rejected). Thus, a constitutional route may remain open for a future Supreme Court reconsideration of its values stance on corporal punishment.

239. 469 U.S. 325 (1985).

240. State in the Interest of T.L.O., 428 A.2d 1327 (N.J. Super. 1980). The fourth amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." This provision generally requires a search warrant to be issued by a judicial officer upon a sufficient showing of "probable cause" to believe that a crime has been committed, before a search can take place. Evidence obtained from an illegal search generally cannot be used by the prosecution at trial. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

241. State *ex rel.* T.L.O., 463 A.2d 934 (N.J. 1983).

The state argued that the exclusionary rule should not be applied in this case because its central purpose, to deter law enforcement officials from violating constitutional rights, had no relevance to school situations. The court held that the school administrator's position vis-a-vis the student was no different from that of a police officer or other municipal official. Accordingly, the court concluded that the exclusionary rule would apply to school cases.

Turning to the second issue, the court held that the normal requirement of obtaining a warrant prior to undertaking a search should not apply in the school setting because of the importance of maintaining safety, order, and discipline within the schools.[242] For assessing the validity of a warrantless school search, the court determined that a general requirement of "reasonableness" would be appropriate, rather than the more stringent "probable cause" standard applicable generally in fourth amendment cases. A high school principal seeking to maintain order and discipline in the school "should not be held to the same probable cause standard as law enforcement officers."[243]

Applying the "reasonableness" standard to this case, the court held the search to be invalid. The vice principal had no reasonable grounds to search T.L.O.'s purse for cigarettes because the school allowed smoking in certain designated areas and, therefore, possession of cigarettes had no bearing on the alleged infraction of smoking in the out-of-bounds area. Moreover, the court held that a student has an expectation of privacy in the contents of her purse."[244]

The thrust of the United States Supreme Court's reversal concerned the "reasonableness" standard and its application to this case. The majority opinion, by Justice White, first considered the in loco parentis doctrine. The premise of this doctrine was that school officials stand in a different relationship to students under their care than do police or other government officials to citizens with whom they interact.[245] The Court held that the doctrine was "in tension

242. *Id.* at 941.

243. *Id.*

244. *Id.* at 942. The vice principal's desire to gather evidence to impeach the student's credibility (since she had denied smoking at all) was not considered sufficient to validate the search.

245. This concept, first articulated by William Blackstone in the 18th century, was a common law device which enabled a parent to delegate part of his parental authority to the tutor of his child, who then stood in loco parentis and exercised that portion of the disciplinary power of the parent as was necessary to carry out the educational mission. 1 W. Blackstone, Commentaries *453.

with contemporary reality and the teachings of this Court.[246] Noting that *Tinker* and *Goss* had already extended constitutional constraints to school officials, Justice White stated that "[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[247]

After noting that students no more shed their fourth amendment than their first amendment rights in passing through the schoolhouse gate, the Court then mandated minimal constitutional requirements which, as in *Goss,* preserved maximum disciplinary discretion for school authorities. Specifically, the Court adopted the New Jersey Supreme Court's reasonableness standard, which it described as an approach that "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[248] The Court defined an inquiry under the "reasonableness" standard as a two-fold process: "[F]irst, one must consider 'whether the . . . action was justified at its inception,' second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[249] A

246. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985). Invocation of the in loco parentis doctrine on the facts of this case had been, in the New Jersey Supreme Court's view, somewhat ironic. A parent who found marijuana in her child's possession would not likely turn that evidence over to the police to initiate a criminal prosecution, as did the vice principal, the "parental substitute" here. 463 A.2d at 938 n.4 *See also* Trosch, Williams & DeVore, Public School Searches and the Fourth Amendment, 11 J. L. & Educ. 41, 53 (1982) [hereinafter Trosch].

A number of other federal and state courts had considered the in loco parentis doctrine still viable, and, in fact, as constituting the justification for applying a lesser "reasonableness" standard for school searches. *See, e.g.,* M. v. Ball-Chatham Community Unified School Dist., 429 F. Supp. 288, 292 (S.D. Ill. 1977). In some cases, the in loco parentis doctrine was articulated in terms of school authorities' responsibility to protect all the children affected by disruptive behavior. *See, e.g.,* Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 480 n.18 (5th Cir. 1982), *cert. denied,* 463 U.S. 1207 (1983); People v. Jackson, 65 Misc.2d 909, 910 (N.Y. App. Term. 1971), *aff'd,* 284 N.E.2d 153 (N.Y. 1972).

247. 469 U.S. at 336.

248. *Id.* at 343. The Court noted that, in addition to the New Jersey Supreme Court, the majority of courts that had considered this issue also applied a "reasonableness" standard, rather than full probable cause requirements, to searches conducted in schools. *See, e.g.,* Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984); People v. Jackson, 65 Misc.2d 909, 910, *aff'd,* 284 N.E.2d 153 (N.Y. 1972); State v. McKinnon, 558 P.2d 781 (Wash. 1977).

249. 469 U.S. at 341 (citation omitted). This two-fold reasonableness standard was taken from the criteria articulated in Terry v. Ohio, 392 U.S. 1, 20 (1967), for justifying prompt "stop and frisk" actions by the police without a warrant or a showing of probable cause. *See also* 4 W. LaFave, Search and Seizure 166-74 (2d ed. 1987) (relating standards for administrative search in Camara v. Municipal Ct., 387 U.S. 523 (1967), to *T.L.O.*).

search will ordinarily be considered "justified at its inception" when:

> there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[250]

In applying the reasonableness standard to the facts in *T.L.O.*, the Supreme Court reached a different conclusion from that of the New Jersey Supreme Court.[251] It held that the vice principal's suspicion that there were cigarettes in a student's purse was the sort of "common sense conclusion about human behavior" upon which "practical people—including government officials—are entitled to rely."[252] The relevance of a student's possession of cigarettes to the question of whether she had been smoking in the prohibited locale and to the credibility of her denial supplied the necessary " 'nexus' between the item searched for and the infraction under investigation."[253]

Justice Brennan, in an opinion dissenting in part, decried the Court's refusal to apply the probable cause standard in the school setting and predicted that the amorphous reasonableness standard "will likely spawn increased litigation and greater uncertainty among teachers and administrators."[254] Although most commentators have tended to agree that the *T.L.O.* holding is too open-

250. 469 U.S. at 342.

251. The reasonableness standard as described by the Supreme Court appears to grant more discretion to school authorities than did the reasonableness standard articulated by the New Jersey Supreme Court and other state and federal courts. The New Jersey Court, quoting from State v. McKinnon, 558 P.2d 781, 784 (Wash. 1977), listed the following series of specific factors to be considered: "the child's age, history and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." 463 A.2d at 942.

252. 469 U.S. at 346.

253. *Id.* at 345.

254. *Id.* at 365 (Brennan, J., dissenting). Agreeing on this point with Justice Brennan, Justice Stevens articulated a Deweyian perspective in stating that the majority decision would constitute "a curious moral for the nation's youth" in failing to properly convey appreciation for the fourth amendment among the values that are conveyed in the classroom. *Id.* at 386 (Stevens, J., dissenting).

Justice Stevens proposed a different approach. He would have distinguished between searches related to trivial violations to which full constitutional standards should apply, and searches involving serious disruptions of the school order (such as heroin addiction or violent gang activity) to which a lesser standard might apply. *Id.* at 377-82. This attempt to carve out areas where traditional fourth amendment standards would apply is analogous to the core/non-core application of the first amendment of the *Tinker/Fraser/Hazelwood* doctrine.

ended,[255] it has also been argued that the reasonableness standard, like the requirements of *Goss,* is merely largely constitutionalizing present school practices.[256] The judicial inclination has been to interpret the "reasonableness" standard broadly and to uphold school authorities' discretion in conducting student searches.[257]

Generally speaking, courts have held that students have a diminished expectation of privacy in school lockers, especially when they have been put on prior notice of the possibility of such searches.[258] Whether courts will allow mass searches for drugs on school grounds without a basis for individual suspicion, an issue explicitly left open by *T.L.O.,*[259] is still unsettled. Contrary to prior trends,[260] however, the first post-*T.L.O.* federal case raising this issue permitted random urinalysis for all students participating in extracurricular sports.[261]

Like *T.L.O.,* most contemporary school search cases involve drug searches, indicating the seriousness of the problems created for the

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255. Note, Using the Reasonable Suspicion Standard To Maintain a Proper Educational Environment To Educate Today's Youth—*New Jersey v. T.L.O.,* 13 N. Ky L. Rev. 253, 272 (1986). *See also* Avery & Simpson, Search and Seizure: A Risk Assessment Model for Public School Officials, 16 J. L. & Educ. 403 (1987) (proposing specific standards for determining reasonableness of school search); Comment, *New Jersey v. T.L.O.:* The School Search Exception to Probable Cause, 21 New England L. Rev. 509, 537 (1985-86). *Cf.* W. LaFave, *supra* note 249, at 174 (close scrutiny of *T.L.O.* by lower courts may show that scope of reasonableness standard is not as broad as it might seem at first).

256. *See* Hogan & Schwartz, The Fourth Amendment and the Public Schools, 7 Whittier L. Rev. 527, 544 (1985) (almost 90% of school districts surveyed regard reasonableness standard as acceptable).

257. *See, e.g.,* Cason v. Cook, 810 F.2d 188 (8th Cir. 1987), *cert. denied,* 107 S. Ct. 3217 (1987) (searches of students in locker room shortly after thefts from lockers upheld); Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1984) (drug search based on uncorroborated, anonymous tip upheld). *But cf.* Cales v. Howell Pub. Schools, 635 F. Supp. 454 (E.D. Mich. 1985) (ambiguous conduct not logically related to drug possession held unreasonable basis for search); In re William G., 709 P.2d 1287 (Cal. 1985) (administrator's "hunch" not sufficient to justify search).

258. *See, e.g.,* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985); State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986).

259. 469 U.S. at 342 n.8.

260. *See, e.g.,* Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied,* 463 U.S. 1207 (1983) (searches of students using drug-sniffing dogs must be supported by individualized suspicion); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (mass strip search for stolen money invalidated); Kuehn v. Renton School Dist., 694 P.2d 1078 (Wash. 1985) (mass search of luggage of students on school trip invalidated). *Contra* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981) (allowing dogs to sniff students for drugs upheld).

261. Shaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988). *Cf.* Oderheim v. Carlstadt E. Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (mandatory drug urinalysis for students invalidated, but court left open possibility that higher percentage of students involved in drug activities may justify this type of search).

schools by the fact that an estimated 65% of all high school seniors have used illicit drugs.[262] The Supreme Court in *T.L.O.*, although sensitizing schools to fourth amendment privacy concerns, was unwilling, at least at this stage, to decree any particularized sweeping national mandates in this difficult area. For example, by declining to decide whether the higher probable cause standard would be required if a school search were conducted in conjunction with, or at the behest of, the police, the Court has left open the complex question of the relation of school discipline to criminal charges.[263]

Consistent with the school authorities' in loco parentis relationship—broadly defined—to the students under their charge, school authorities seem to prefer to deal with drug problems through their own techniques,[264] and they defer to police to solve the drug problem in their midst rarely and reluctantly.[265] Whether schools will be able to successfully balance student privacy rights and drug control needs, especially in light of the near crisis proportion of the drug problem in many large urban school settings,[266] remains to be seen.

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262. Trosch, *supra* note 246, at 41. In the 20th Annual Gallup Poll of the Public's Attitude Toward the Public Schools, discipline and drug use were cited as the major problems facing the schools. 70 Phi Delta Kappan 33 (1988).

263. In Cason v. Cook, 810 F.2d 188 (8th Cir. 1987), *cert. denied*, 107 S. Ct. 3217 (1987), the Court indicated that a search held "in conjunction with" the police is subject to the reasonableness standard, although one "at their behest" might not be. In Martens v. District No. 220, 620 F. Supp. 29, 32 (N.D. Ill. 1985), where police officers who were on the premises "for another matter" helped with the search, the court indicated that a follow-up criminal prosecution might require full warrant and probable cause standards. *See also* Tarter v. Raybuck, 742 F.2d 977, 983 (6th Cir. 1984) (police presence during search might require probable cause standard if evidence is used in criminal prosecution).

264. This position is consistent with the broad concept of in loco parentis articulated by the courts in Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, and People v. Jackson, 65 Misc.2d 909 (N.Y. App. Term. 1971), *aff'd*, 284 N.E.2d 153 (N.Y. 1972).

265. A recent study of serious crimes in inner-city Chicago elementary schools indicated that only 15% of cases that required reports to the police by law were reported, and only 1% of these resulted in an arrest. Menacker, Getting Tough on School Connected Crime in Illinois, 51 Educ. L. Rept. 347, 351 (West) (1989). Menacker explains this data as reflecting frustration at the lack of conviction of the offenders. *Id.* Another explanation may be a reluctance on the part of the Chicago school authorities to bring criminal justice issues into the schools, especially at the elementary school level. *See also* Jennings v. Joshua Indep. School Dist., 869 F.2d 870 (5th Cir. 1989) (discussing school policy of calling in police to search student cars suspected of concealing drugs, only after both students and parents have refused to consent to a search).

266. *See, e.g.*, Gately, Shootings Hurting Baltimore Schools, N.Y. Times, Nov. 6, 1988, at 59 (in one three-week period, four students were wounded in shootings in Baltimore high schools, one student was raped, another stabbed, and an eleven-year-old sodomized). A 1978 H.E.W. study found that at least 157,000 incidents of crime and disruption occur in American schools in a typical month, of which 50,000 are reported to the police. Boesel, Violent Schools-Safe Schools (1978). *See generally*, K. Baker & R. Rubel, Violence and Crime in the Schools (1980). At least one state has considered the overall problem of school violence so great that it has enacted a constitutional right to school safety. *See* Cal. Const. art. 7a.

The use of extreme security measures, such as comprehensive searches by trained dogs,[267] two-way mirrors to observe illicit activities,[268] and placing metal detectors at school entrances,[269] are activities that obviously go well beyond any traditional concepts of school discipline.[270]

VI. Conclusion

The discussion of political values and discipline values has shown that major court decisions have significant implications for values inculcation in the schools, but in ways that often are misunderstood. Generally speaking, the courts influence values, not through inflexible mandates, but by establishing values parameters which allow broad scope for diverse local implementation. In other words, judicial intervention, properly understood, can promote, rather than impede, local decision-making on difficult values issues.

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267. In Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), in response to an outbreak of drug use in the schools, a search team, including trained dogs, methodically visited every high school and junior high school class in the area, while police were stationed in the halls and escorts were required for trips to the bathroom, in order to guard against disposal of illicit drugs. The search led to 50 alerts and 11 body searches. Seventeen students were found in possession of drugs. The Seventh Circuit Court of Appeals upheld the drug search using dogs, but not strip searches. Justice Brennan, dissenting from the Supreme Court's denial of certiorari, 451 U.S. 1022 (1981), stated that this "student-by-student dragnet inspection" violated the fourth amendment. *See also* Horton v. Goose Creek Indep. School Dist., 670 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (upholding sniffing by dogs of student lockers, but not sniffing of students themselves); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (police department sniffer dogs used to conduct drug searches on school lockers).

268. *See* Stern v. New Haven Community Schools, 529 F. Supp. 31 (E.D. Mich. 1981) (use of two-way mirror in school lavatory to observe drug sale upheld).

269. The City of Detroit has purchased 45 airport-style metal detectors for use in most of the city high schools to combat a rising tide of serious assaults and murders in the schools. Note, School Metal Detector Searches and the Fourth Amendment: An Empirical Study, 19 J. L. Reform 1037, 1058-72 (1986) (outlining Detroit's experiences with metal detectors). The City of New York is also working with these devices. *See* Sacher, Five Schools Try Metal Detectors, N.Y. Newsday, May 5, 1988, at 2.

270. An additional dimension of discipline problems in contemporary schools is raised by the constraints posed by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. [hereinafter EHA]. As interpreted by the Supreme Court in Honig v. Doe, 108 S. Ct. 592 (1988), the EHA requires that emotionally disturbed students be maintained in their current educational placements during the pendency of an educational review process even if the student poses a danger to herself or other students in the classroom. Thus, the precise result the Supreme Court scrupulously sought to avoid in its constitutional decisions in *Goss* and *T.L.O.*—imposing extensive procedural requirements and limiting the discretion of school authorities to respond promptly to discipline problems—was statutorily mandated in regard to children with handicapping conditions. Some school districts have predicted that *Honig* will seriously affect their ability to discipline these students; this precedent conceivably could also influence disciplinary processes for other students who share their environment. *Cf.* J. Handler, The Conditions of Discretion (1986) (arguing that informal, unstructured decisonmaking, with parental involvement, is necessary in special education).

A. The Values Agenda

In both of the values areas analyzed in this Article, the major Supreme Court cases have established general parameters which tilt in a progressive direction, but moderately so. Thus, *Barnette* and *Tinker* upheld student rights to dissent, but the application of the first amendment to the school setting was done in a way that preserved the vitality of competing traditional civic values. Similarly, the Court's articulation of due process and reasonable search requirements in *Goss* and *T.L.O.* ensured that most disciplinary sanctions are meted out fairly, but without affecting the school authorities' prerogatives to enforce particular disciplinary approaches.

Most writings on the impact of judicial decisions tend to focus on the extent of compliance with measurable aspects of court decrees[271] or on the degree of public approval of these decisions.[272] At least with regard to educational values, however, the critical impact issue is not the degree of compliance with specific mandates, but rather the broader, indirect attitudinal influence of judicial intervention. The significance of *Goss,* for example, lies not in the minimal procedural requirements it imposed, but rather in the general attitudinal shift toward broad based acceptance of the value of procedural fairness which it has apparently inspired. Similarly, *Pico* apparently has had a substantial impact on textbook and library selection processes,[273] even though there was no majority opinion announcing a specific mandatory standard and the case was settled on remand without a trial.

Indeed, in some situations, the impact of a court ruling may influence events in an opposite direction from the stance which the Court itself actually took. For example, one outcome of the Supreme Court's refusal to place procedural limits on the imposition of corporal punishment in *Ingraham* was that many state legislatures and local school boards were motivated to adopt such limits or

271. *See, e.g.*, W. Muir, Law and Attitude Change (1973) (empirical analysis of extent of compliance with school prayer decisions). *See generally* T. Becker & M. Feeley, The Impact of Supreme Court Decisions (2d ed. 1973).

272. For example, the 20th Annual Gallup Poll on the public's attitudes toward the public schools revealed that 59% of the national sample thought that *Hazelwood* was a "good ruling;" 28% considered it a "bad ruling;" and 13% said they "don't know." 70 Phi Delta Kappan 44 (1988).

273. A survey of 215 school districts in June 1987, five years after *Pico,* indicated that the number of districts reporting incidents of library removals was roughly the same as in pre-*Pico* years, but that among those reporting incidents "about 1 in 4 said the challenges had increased in number." H. Reichman, *supra* note 142, at 10.

to prohibit explicitly the use of corporal punishment.[274] The fact that language in court decisions broadly influences educational values, even beyond the specific holdings, means that greater attention may need to be given to how well judges perceive the full implications of their rulings.[275]

An additional important, and often overlooked, dimension of court decisions is the balanced manner in which controversial values issues are discussed and explicated, even when they are not fully resolved by the particular holding of the case. Most of the major cases discussed in this article were close decisions which stimulated a variety of concurring and dissenting opinions. The colloquy among the justices in these decisions involved not only fine points of legal doctrine, but also major controversies of educational theory. For example, Justice Powell's dissent in *Goss* and Justice Fortas's majority opinion in *Tinker* stated Durkheimian and Deweyian positions that almost read like pedagogic treatises.

Because of the balanced way that controversial values are set forth in court decisions, judicial articulation of values controversies can provide an appropriate agenda for local community discussions on the subject areas in question. Court cases tend to address issues in a way that promotes pluralistic conversation, rather than ideological confrontation.[276] For example, as seen through the case discussions, the competing political values of patriotism and liberty, or of dissenting speech and respect for majoritarian values, are perceived

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274. *See, e.g.*, Hyman, A Social Science Analysis of Evidence Cited in Litigation on Corporal Punishment, in Corporal Punishment in American Education 400 (I. Hyman & J. Wise eds. 1979) ("Over fifty school districts, some of them the largest in the country, including New York, Chicago and Baltimore . . . have eliminated the use of corporal punishment."). *See also* Fine, Just Schools, in School Days, Rule Days, *supra* note 36, at 302, 309 (noting that cases that lost in court resulted in more public concern and educational follow-up than cases that won).

275. Note in this regard that several of the judges at the Yale symposium acknowledged that judges sometimes misestimate the impact that changes they mandate will have on schools. *See also* Tushnet, Free Expression and the Young Adult: A Constitutional Framework, 1976 U. Ill. L.F. 746, 762 (arguing that court decisions often reflect images of school life stemming from a time when schools were very different from what they are today and that judges too readily apply doctrines developed in other contexts to the schooling area).

One of the judges at the Yale symposium proposed a "pre-filing mechanism" that would transfer a case involving substantial educational values issues to an independent panel of education advisors who would report to the judge before a decision is reached. *Cf.* Miller and Barron, The Supreme Court, the Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry, 61 Va. L. Rev. 1187, 1240-41 (1975) (proposing appointment of panel of resident social scientists by U.S. Supreme Court).

276. Indeed, ideologically diverse participants at the Yale symposium reached a general agreement in several values areas covered. Although this single experience constitutes at this stage no more than a hypothesis which requires further testing, in a variety of other settings, it does indicate that the manner in which controversial issues are

not as sharply defined partisan positions, but as valid, qualified principles which need to be balanced against other valid, qualified principles. Similarly, the competing discipline values of respect for authority and development of self-discipline, or of personal privacy and maintenance of institutional order, when seen through the case law perspective, all constitute legitimate components of a broad, shared moral order.

In short, then, values issues as articulated in court cases, analyzed in relation to broader contemporary pedagogic concerns—as was done with the six political and discipline values discussed in this article—constitute an appropriate agenda for a pluralistic dialogue because they tend to be cast in balanced, non-ideological terms. Since court holdings rarely resolve all of the controversies presented, significant scope is left for local communities to pick up the conversation where the court discussion left off. How local communities can effectively accept that challenge will be discussed in the next subsection.

B. The Values Dialogue Methodology

The aim of pluralistic decisionmaking with respect to controversial values issues is to formulate positions that are acceptable to the broadest possible number of people affected by the decision. In order to do so, an effective process must strive to incorporate all relevant viewpoints, anchor any conclusions in the reality of everyday schooling experiences and remain flexible to accommodate changes over time. The courts' common law approach provides a relevant model in this regard since the common law methodology promotes comprehensiveness, empirical grounding, and flexibility in decisionmaking. This is not to say, of course, that the courts' common law approaches on specific issues are always effective. For example, the Court's 19-year delay in considering the impact of *Tinker* on countervailing educational values may have hardened attitudes and affected the reaction to *Fraser* and *Hazelwood.*

There is, however, a danger that any such pluralistic process will become so diverse and so flexible that it will lose its principled core. Such an outcome in a values dialogue process would be especially unfortunate. The court cases appear to have established values parameters for educational decisionmaking, thus potentially providing

presented can significantly influence the potential for agreement in a pluralistic dialogue.

a necessary anchor for local community dialogues on educational values issues.

Generally speaking, the major court decisions discussed in this Article have established such values parameters in a way that promotes pluralistic local decisionmaking. The *Tinker/Fraser/Hazelwood* first amendment doctrines, the reasonable search standard of *T.L.O.*, and the due process requirements of *Goss* have all imposed constitutionally based values, but in a flexible, open manner. *Pico* and *Ingraham* influenced the value climate without even imposing any specific judicial remedies.

Within the values parameters established by the cases, broad scope remains for local officials to take traditional Durkheimian or progressive Deweyian approaches to political or discipline values. Each local community can decide what due process procedures above the *Goss* minimum should be implemented, how patriotism should be defined and civic education taught, the extent to which school officials should censor high school newspapers or otherwise influence student speech in core educational areas, and the desirability of corporal punishment and whether parents should be given individual options on its use.[277]

The broad scope for local decisionmaking permitted by major court decisions is often misunderstood.[278] For example, much indignation has been expressed by high school students and parents at the *Hazelwood* decision, which is seen as having imposed a censorship requirement on all high school newspapers. In fact, of course, the essence of the Court's holding was far more permissive. The Court did not mandate that each high school administration must censor its newspapers; rather, it left the matter open for local option. Thus, states that adopt statutes guaranteeing full freedom of

277. Although the Supreme Court explicitly denied as a matter of constitutional law the right of individual parents who oppose corporal punishment to request alternative punishment options for their children, Ingraham v. Wright, 430 U.S. at 662 n.22, many of the educators at the Yale symposium thought that providing such options was an educationally sound and feasible approach. The Supreme Court's stance does not preclude local school districts from voluntarily providing such options.

278. More attention clearly needs to be given to how information concerning court cases affecting the schools is disseminated to the public and particularly to school board members, parents, and students. Public and professional perceptions often are based on inadequate, headline-level understanding of complex legal issues. *See, e.g.*, J. Henning, *supra* note 13, at 232 (41% of administrators and 14% of teachers surveyed thought they had inadequate comprehension of students' rights issues). The convening of local community values forums, as contemplated by the methodology proposed in this Article, may help remedy this situation.

the press to student journalists,[279] or individual school boards that choose to delegate such autonomy to their high school newspapers,[280] would not run afoul of any Supreme Court mandates.

The pluralistic values dialogue methodology which emerges from our analysis of political and discipline values can best be understood as a process that establishes an important implicit distinction between certain transcendent "national values," which relate to rights that the courts have concluded warrant uniform judicial protection throughout the country, and other "community values," which are left to local discretion.[281] For example, on certain constitutional issues, such as desegregation or school prayer, the courts have established clear substantive precepts to which all school communities must adhere. With other important values inculcation matters, however, such as those dealing with sex education, the courts have left values preferences largely to local communities.

Articulation of an explicit national/community values distinction should promote awareness by school communities of the extent to which highly significant areas of values articulation remain their responsibility. The national/local community distinction can also help focus the terms of the values debate, both in legal and nonlegal forums. For example, much of the debate on corporal punishment confuses the issue of whether the practice violates constitutional rights or universal moral standards (a national norm) with the question of whether corporal punishment is educationally effective or politically acceptable (a local norm).[282] If distinctions were regularly made in national/community values terms, the positions of the courts, the commentators, and the public on these matters could be better understood and better handled.

Pico provides a case in point. Justice Brennan's plurality decision was based in large part on the concept that assuring that schools are

279. For example, Calif. Educ. Code § 48907 (West 1989) establishes a right of free expression in student newspapers, whether or not such publications are supported by the school. *See* Leeb v. DeLong, 243 Cal. Rptr. 494, 497 (Cal. App. 1988) (*Hazelwood* held not applicable in California because of § 48907).

280. In the wake of *Hazelwood*, a number of individual school boards have, in fact, adopted policies which recognize student newspapers as a public forum. *See* Hazelwood Spurs Districts to Review Student Press Policies, School Board News, Nov. 9, 1988, at 1, 5.

281. A suggestion for an analogous analytic distinction between national and local values issues in areas such as environmental law and labor law is set forth in Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 504-08 (1988).

282. *Compare* Note, Due Process, Due Politics and Due Respect: Three Modes of Legitimate School Governance, 94 Harv. L. Rev. 1106, 1112-16 (1981) (arguing that local decisionmaking on corporal punishment represents model of democratic control of schools).

a "marketplace of ideas" is an important national value. The dissenters were critical not only of the constitutional premises for this position, but also of the assumption that courts could enforce such a diversity standard. Given the broad values impact of court decisions, it may be, however, that the "feasibility" of values stances by the Supreme Court should be seen in a different light. Although it is clear that the federal courts cannot police every classroom in the land to be sure that teachers present a full range of ideas, an emphasis by the courts on the importance of diversity as a substantive national value might give significant legitimacy to this aspect of tolerance values;[283] it may then motivate individuals and groups on the local level to work out appropriate implementation mechanisms.

Ultimately, however, the primary result of a clear national/local community values distinction will not be to enhance the role of the courts; necessarily the number of appropriate national value issues will be limited. Rather, it is likely to promote more active involvement of school boards and local communities in the formulation and inculcation of a broader range of substantive values.[284]

Thus, the initial indications are that a pluralistic dialogue methodology which delegates to local communities responsibility for extensive decisionmaking on critical values issues through a focused, balanced agenda can clarify and affirm substantive local values positions. It also may do so in a way that induces participants to reconsider long-standing attitudes and to make significant progress in

283. The significance of the broad national values articulating role of the Supreme Court raises questions about the Supreme Court's approach to antidiscrimination values in Runyon v. McCreary, 427 U.S. 160 (1976). There, in the course of a decision banning the exclusion of black school children from admission to private schools, the Court stated that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . ." *Id.* at 176. This language, though dictum, may be read as endorsing the conveyance of discriminatory values in the schools, or more likely as discouraging schools from affirmatively asserting antidiscrimination as a positive substantive value.

On its face, the Court's statement implies that private schools, and possibly even public schools, can inculcate discriminatory values. Pierce v. Society of Sisters, 268 U.S. 510 (1925), however, insisted that even private schools must teach "studies plainly essential to good citizenship . . . ." *Id.* at 534. For these reasons, the Court should go on record as affirming the right, or more appropriately the obligation, of all schools to teach affirmatively the value of nondiscrimination. Consistent with the distinction between "ideological tolerance" and "institutional tolerance" discussed at *supra* notes 168-69 and accompanying text, such an affirmation of the antidiscrimination principle can be articulated without jeopardizing the first amendment rights of individual dissenters. *See also* Stewart, The First Amendment, the Public Schools and the Inculcation of Community Values, 18 J. L. & Educ. 23 (1989) (advocating clear community endorsement of values in materials presented in local educational programs).

284. The discussion at the Yale symposium indicated both the depth of interest in these values issues and the range of potential creativity for dealing with them in a pluralistic setting.

probing, understanding, and ultimately resolving values conflicts. In this sense, pluralism can be seen not as a "struggle among interest groups for scarce social resources,"[285] but as an opportunity "for the possibility of association among people who share *some, but not all* beliefs and values."[286]

This is not to deny that ideological debate "can sometimes create and exacerbate divisions and disputes in a public political context."[287] It is, however, to take cognizance of the fact that discussions concerning the values in which the community's children should be imbued present the optimal setting for testing the potential of local participatory democracy. Many of those who decry the loss of a sense of values in contemporary America look back to the classical Republican tradition as a model of effective citizen engagement.[288] Properly implemented, pluralistic community dialogues on the schools can become a source of contemporary civic inspiration.[289]

285. Sunstein, Beyond The Republican Revival, 97 Yale L.J. 1539, 1542 (1988).

286. J. Kirkpatrick, The Teaching of Democratic Values, Amer. Educ., Spring 1979, at 37. *Cf.* Minow, Forward: Justice Engendered, 101 Harv. L. Rev. 10, 72 (discussing need to take perspective of the person you have called "different"). *See also* S. Benhabib, Critique, Norm, and Utopia 349 (1986).

287. Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 Yale L.J. 1651, 1657 (1988).

288. The revival of interest in classical republican thinking began with a school of historians who stressed the significance of classical republican thought, "as distinguished from Lockean liberalism," among the founding fathers. *See, e.g.*, J. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); G. Wills, Inventing America: Jefferson's Declaration of Independence (1987); G. Wood, The Creation of the American Republic, 1776-1787 (1969). Legal scholars have also found justifications for reconsidering the public interest role of the courts and other institutions from this republican perspective. *See, e.g.*, Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986); Michelman, Law's Republic, 97 Yale L.J. 1493 (1988); Sunstein, *supra* note 281. *See also* W. Sullivan, Reconstructing Public Philosophy 209-29 (1982) (emphasis on "civic virtue" in classical republican thought seen as basis for a new values-oriented public philosophy).

289. The Project on Schools, Values and the Courts, which undertook the research and sponsored the symposium on which this article was based, intends to initiate dialogues on political and discipline values in a number of local communities in order to test the pluralistic values methodology discussed in the text. Further national values issue symposia to establish broad values agendas and further local community dialogues to explore their application are also planned in the areas of character values, equity values, sexual values, and religious values.